party's intended use is guaranteed a de facto win simply by the passage of time. *Id.* Through this, a party may independently achieve a result the court was unwilling to grant when it decided the case. *Id.* For these reasons, this Court should narrow its inquiry for the proper legal framework to the balancing-of-interests test and the contractual approach.

A. Texas legislative policy supports the application of the balancing-of-interests test when a party has a change of heart after entering an agreement that would result in procreation.

This Court has long held that parties may not contract in a manner that contravenes public policy. *Curlee v. Walker*, 244 S.W. 497, 498 (Tex. 1922). Texas positive law is the first place to turn when asking what constitutes Texas public policy. The Texas legislature has addressed the enforcement of agreements for assisted reproduction and surrogacy in the Uniform Parentage Act. Tex. Fam. Code Ann. §§ 160.701–.707, .751–.763. The Act recognizes changes in heart and the role of the court in procreational agreements. These principles can inform whether the enforcement of Reanna and Axel's agreement would violate Texas policy.

1. Texas legislative policy gives effect to a party's change of heart in agreements for procreation.

Human nature does not evaporate once a contract is signed. Parties acting in good faith may enter an agreement and then later have a change of heart. The likelihood of a person changing their mind increases when the subject matter is an intimate topic, and even more so over time. *See In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003) (explaining the difficulty of deciding to relinquish a right before exercising that right). The Texas Family Code (TFC) recognizes and gives effect to

this reality in agreements to procreate through surrogacy and assisted reproduction. Tex. Fam. Code Ann. §§ 160.706, .754(e), .759(a).

TFC gives effect to changes of heart in surrogacy agreements in two provisions. First, TFC permits parties to terminate a surrogacy agreement before insemination. Tex. Fam. Code Ann. § 160.759(a). Any party to the agreement may terminate it, including the gestational mother, spouse, or intended parent. *Id.* Second, TFC provides that parties to a surrogacy agreement must enter the agreement at least 14 days before insemination. Tex. Fam. Code Ann. § 160.754(e). By providing a two-week window for the parties to reflect upon the agreement, the legislature recognized that people are apt to change their minds in consequential matters like procreation. For this reason, the law permits a party to withdraw from the agreement without penalty. *Id.*

TFC also addresses changes of heart in the context of assisted reproduction, specifically the effect of a dissolved marriage on an assisted reproduction agreement. Tex. Fam. Code Ann. § 160.706. The statute expressly permits a former spouse to withdraw their consent to assisted reproduction before insemination. *Id.* Even after divorce, a spouse can change their mind about participating in assisted reproduction and thus avoid legal parenthood. *Id.*; J.A. at 18.

These statutes demonstrate that Texas law does not force a person to procreate against their will for the sake of contractual posterity. Instead, the law recognizes and gives effect to a party's change of heart in agreements to procreate. J.A. at 18–19. Courts outside of Texas have reached similar conclusions after examining their

states' laws on contracts that involve familial relationships (e.g., surrogacy, adoption, and marriage). *See, e.g.*, *J.B.*, 783 A.2d at 717–19 (holding assisted reproduction agreements are enforceable subject to the right of either party to change their mind about the disposition of pre-embryos); *Witten*, 672 N.W.2d at 781–83 (reasoning that giving effect to either party's change of heart acknowledges policy concerns inherent in enforcing prior decisions of a personal nature, like IVF).

Here, Reanna and Axel's agreement is like the agreements for surrogacy and assisted reproduction addressed by the legislature in two ways: (1) the makeup of the parties and (2) the purpose of the agreement. First, in agreements for surrogacy and assisted reproduction, the parties are a couple seeking to have a child and a third party. Tex. Fam. Code Ann. §§ 160.704, .754. In surrogacy agreements, the third party is the surrogate mother; in assisted reproduction, the third party is the health care provider. Tex. Fam. Code Ann. §§ 160.704, .754. Here, Reanna and Axel were a married couple seeking to have children when they signed the informed consent form. J.A. at 7. The third party to their agreement is the Center. J.A. at 5, 7. Therefore, the parties to Reanna and Axel's agreement are like the parties to the procreational agreements addressed by the legislature. Tex. Fam. Code Ann. §§ 160.704, .754. Second, surrogacy and assisted reproduction agreements share the same ultimate purpose as Reanna and Axel's informed consent form: for some parties to achieve procreation. J.A. at 7. For these reasons, the legislative intent behind these surrogacy and assisted reproduction provisions should apply to Reanna and Axel's agreement.

Further, Reanna has had a sincere change of heart. J.A. at 9. The informed consent form does not reflect her present desires, and Texas policy does not force her to be bound by that agreement. J.A. at 9, 19. Instead, the balancing-of-interests test is the appropriate framework to resolve her dispute. J.A. at 9. This approach would allow the Court to carefully weigh Reanna's present interests and desires, alongside Axel's present interests and desires, in deciding who should retain custody of the pre-embryos. *See J.B.*, 783 A.2d 716–17, 719–20 (applying the balancing-of-interests test). Recognizing that people often change their minds about significant life events, the balancing-of-interests approach gives this Court the power to "break [the] deadlock" between the disagreeing parties. J.A. at 19. For this reason, the mutual contemporaneous consent approach would be inappropriate. *See Rooks*, 429 P.3d at 589 (explaining the mutual contemporaneous consent approach fails to resolve disputes effectively). Although that approach would recognize Reanna's change of heart, it would prolong rather than resolve the parties' dispute. *Id.*

2. Texas legislative policy affirms the role of the court in determining whether to enforce procreation agreements.

While freedom of contract is a valued Texas policy, the legislature has expressed that judicial intervention is warranted and necessary for certain types of contracts. Tex. Fam. Code Ann. §§ 160.755, .756. TFC permits parties to enter surrogacy agreements freely, but a court must validate the agreement. Tex. Fam. Code Ann. § 160.754(a). The court considers several factors, including whether each party has voluntarily entered and understands the agreement. Tex. Fam. Code Ann.

§ 160.756(b). A court may choose to validate an agreement at its discretion, and an agreement that the court does not validate is unenforceable. Tex. Fam. Code Ann. §§ 160.756(d), .762(a).

Texas policy does not reflect no-holds-barred freedom of contract for parties entering agreements for procreation. Tex. Fam. Code Ann. §§ 160.756(b), (d), .762(a). Instead, the law demonstrates a clear and prescribed role for the judiciary. Tex. Fam. Code Ann. §§ 160.756(b), (d), .762(a). Given the sensitive subject matter, the legislature has deemed it necessary for courts to have the final say on whether a surrogacy agreement is valid and enforceable. J.A. at 18.

Reanna and Axel's agreement warrants the same judicial treatment as surrogacy agreements because the parties' makeup and the agreements' purposes are similar. For this reason, this Court should play a role in determining the enforceability of assisted reproduction agreements when a party changes its mind. *See* J.A. at 18–19 (finding the legislature's intent extends to this case). In both scenarios, the State has an interest in protecting vulnerable parties contracting for highly intimate, consequential subject matter: children.

The balancing-of-interests test provides the necessary judicial discretion for Reanna and Axel's dispute. This approach is also analytically similar to the court's validation of surrogacy agreements. *See Rooks*, 429 P.3d at 593–94 (listing the factors for the balancing-of-interests test); Tex. Fam. Code Ann. § 160.756(b). Both analyses consider the parties' conduct in reaching a procreative decision. *Rooks*, 429 P.3d at 594; Tex. Fam. Code Ann. § 160.756(b). Under the balancing-of-interests test, the

court considers whether either party has acted in bad faith to control the pre-embryos. *Rooks*, 429 P.3d at 594. Similarly, the court assesses whether the parties voluntarily entered and understood the surrogacy agreement, which includes considering any bad faith conduct by one party in obtaining the assent of another. Tex. Fam. Code Ann. § 160.756(b)(4). Additionally, both analyses consider the parties' physical ability to bear children and intent for entering the agreement. Tex. Fam. Code Ann. §§ 160.756(b)(2), (4), (5); *Rooks*, 429 P.3d at 593–94. Because of these similarities, applying the balancing-of-interests test to the parties' dispute is an appropriate expression and extension of legislative intent.

Meanwhile, applying the mutual contemporaneous consent approach here would be inconsistent with the legislature's intent for courts to settle disputes involving procreation affirmatively. Tex. Fam. Code Ann. §§ 160.755, .756. The parties have turned to this Court for a swift resolution of their dispute; the Court should not send them home without a remedy. *Rooks*, 429 P.3d at 592.

3. The *Roman* court's analysis of Texas policy should not extend to this case.

While the *Roman* court addressed current Texas law regarding surrogacy and assisted reproduction, its analysis was incomplete and did not provide a workable remedy for this dispute. *See Roman v. Roman*, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), *cert. denied*, 552 U.S. 1258 (2008).

After a cursory review of the TFC provisions on surrogacy and assisted reproduction, *Roman* gleaned that the policy of this state would permit a husband and wife to enter an advance agreement that provides the disposition of pre-embryos

in the event of contingencies. *Roman*, 193 S.W.3d at 49–50; J.A. at 18. From this observation, the court jumped to the sweeping conclusion that enforcing such agreements would not violate Texas policy. *Roman*, 193 S.W.3d at 50; J.A. at 18. But a policy that permits an agreement to exist does not necessarily permit the enforcement of that agreement when a party changes its mind. In reaching its decision, the *Roman* court ignored the legislature's clear recognition of a party's change of heart in other agreements to procreate. Tex. Fam. Code Ann. §§ 160.706, .754(e), .759(a); J.A. at 18–19.

Further, the *Roman* court reconciled the risks associated with changes of heart with an inadequate solution. When a court chooses not to recognize a change of heart, it denies a party's present procreative interests and desires. *See Roman*, 193 S.W.3d at 45 (identifying the risks associated with enforcing an agreement that no longer reflects a party's desires). *Roman* noted the prevalence of provisions that permit parties to modify the terms of an assisted reproduction agreement with their mutual, written consent. *Id.* The court concluded that such provisions sufficiently protect parties from the risks associated with changes of heart. *Id.* But this type of provision only protects a party's change of heart when the other party feels the same way. It does not protect a party that has independently changed its mind.

Here, the parties' agreement contained a provision that allowed them to modify their agreement with joint, written consent. J.A. at 38. This provision bears no relevance to Reanna and Axel's dispute. If the parties could reach a mutual decision to modify their agreement, they would not be in court. J.A. at 19. For these reasons,

Roman's conclusions regarding Texas policy should not inform this Court's decision. J.A. at 18.

B. Applying the balancing-of-interests test when a party has a change of heart after entering an agreement requiring procreation would be consistent with precedent in most jurisdictions, including Texas.

Case law addressing IVF agreements demonstrates a preference for enforcing agreements that do not result in the creation of life and discomfort with enforcing agreements that would force one party to procreate against its will.

1. Courts generally do not enforce contracts that would force a party to procreate against its will.

In virtually every case that has applied the contractual approach, the effect of the parties' agreement was to discard the remaining pre-embryos or donate them to research in the event of divorce. *See, e.g.*, *Roman*, 193 S.W.3d at 42 (contract provided the pre-embryos shall be discarded); *Kass v. Kass*, 696 N.E.2d 174, 181 (N.Y. 1998) (contract provided the pre-embryos shall be donated to the IVF clinic's research program); *Bilbao*, 217 A.3d at 980 (contract provided the pre-embryos shall be discarded); *Litowitz v. Litowitz*, 48 P.3d 261, 264 (Wash. 2002) (contract provided the pre-embryos shall be discarded after five years); *Dahl v. Angle*, 194 P.3d 834, 836–38 (Or. Ct. App. 2008) (contract provided the wife was the decision-maker and her preference was to discard pre-embryos). Under these contracts' terms, neither party would become a parent against its will because the pre-embryos would never be implanted. *See, e.g.*, *Bilbao*, 217 A.3d at 980 (pre-embryos discarded by clinic).

Meanwhile, in jurisdictions that have applied the balancing-of-interests test, the effect of enforcing the parties' agreement was that one party would become a genetic or biological parent against their wishes. *See, e.g.*, *J.B.*, 783 A.2d at 717 (refusing to enforce an agreement that would force the wife to be a genetic parent against her will by donating the pre-embryos to another couple, applying the balancing-of-interests test instead); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (refusing to enforce an agreement that gave the wife sole custody of the pre-embryos because it would force the husband to become a biological father against his will, applying balancing-of-interests test instead); *McQueen v. Gadberry*, 507 S.W.3d 127, 147 (Mo. Ct. App. 2016) (refusing to enforce an agreement that would force the husband to become a biological father against his will by providing the wife sole custody of the pre-embryos). In these cases, one party had a change of heart since entering the agreement. *E.g.*, *J.B.*, 783 A.2d at 710. These holdings demonstrate a judicial discomfort with enforcing agreements that require a party to procreate in a manner that no longer reflects their will. *See, e.g.*, *id.* at 719 (holding IVF agreements are unenforceable when a party changes its mind). This hesitation makes sense, given that state and federal courts are bound to protect a person's constitutional right to avoid procreation. *See, e.g.*, *id.* at 715–16 (acknowledging the implication of parties' constitutional rights in procreation disputes).

Applying the balancing-of-interests test here, the Court would not force either party to procreate by blind enforcement of the informed consent form. Instead, the Court would weigh the parties' relative interests and desires before permitting or

denying further procreation. *See, e.g.*, *A.Z.*, 725 N.E.2d at 1058 (applying the balancing-of-interests test).

This case is complicated. A decision in favor of either party under the balancing-of-interests test could force procreation. Reanna may become a genetic parent to the pre-embryos donated to another couple, or Axel may become a biological parent to Reanna's children resulting from IVF. *See* J.A. at 10–11 (citing the parties' desired outcomes). That said, it is essential to distinguish process from results. Whether a court should compel one party to be a parent against its will under the balancing-of-interests test is a separate inquiry addressed by the second issue before this Court. But before the Court can address that question, it must first decide on the proper framework for reaching its result. Is it the blind enforcement of a contract or an impartial and judicious review of the parties' relative interests and desires? Process matters. In cases where enforcing the parties' agreement would result in forced procreation, the balancing-of-interests test is a fairer procedural pathway than the contractual approach.

2. Applying the mutual contemporaneous consent approach would be inconsistent with precedent.

Most courts have rejected the mutual contemporaneous consent approach. *See, e.g.*, *Rooks*, 429 P.3d at 589 (categorically rejecting the mutual contemporaneous consent approach). Courts consider this framework inadequate for resolving disputes because it is unrealistic and gives one party a de facto veto over the other party. *Id.* These downsides outweigh the approach's only benefit: it does not force a party to procreate against its will. That said, avoiding forced procreation may be little

consolation to parties who are forced instead into an indefinite gridlock under this approach.

The mutual contemporaneous consent approach would be an ineffective framework for resolving the parties' dispute. Reanna and Axel have not reached a mutual decision regarding the disposition of their remaining pre-embryos. J.A. at 8–9, 19. If the Court applies the mutual contemporaneous consent approach here, the pre-embryos will stay in the Center's custody until the parties reach a joint decision. J.A. at 9, 11. Axel will achieve his desired result of avoiding procreation with Reanna so long as the pre-embryos remain in the Center's storage. J.A. at 9, 11. He will effectively prevail because the passage of time serves his interests, not because the Court decided he should win on the merits of this case. *See Rooks*, 429 P.3d at 589 (explaining the problematic de facto veto power inherent to this approach).

II. In the alternative, this Court should affirm because courts apply the balancing-of-interests test absent an enforceable agreement governing the disposition of the parties' pre-embryos after divorce.

Even if the contractual approach is appropriate in some cases (it is not here), jurisdictions that have applied it concede that the balancing-of-interests test is the best approach when there is no enforceable contractual agreement. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992). An agreement's enforceability depends on whether the parties mutually assented to it.

A. Courts do not enforce agreements that lack mutual assent.

Mutual assent is a key requirement of an enforceable agreement. *See, e.g.*, *In re Hawthorne Townhomes, L.P.*, 282 S.W.3d 131, 139 (Tex. App.—Dallas 2009, no

pet.). Courts will not enforce a contract without both parties' clear offer and acceptance. *See, e.g.*, *Roach v. Dickenson*, 50 S.W.3d 709, 713 (Tex. App.—Eastland 2001, no pet.).

1. Informed consent forms that lack mutual assent are unenforceable as binding agreements in disputes between IVF couples.

A court may enforce an informed consent form for IVF only if the form manifests the parties' intent to be bound. *Jocelyn P. v. Joshua P.*, 250 A.3d 373, 380–81 (Md. Ct. Spec. App. 2021). Courts have expressed doubts as to whether informed consent forms in this context demonstrate mutual assent for three reasons: (1) form contracts lack express direction from the progenitors, (2) concerns about timing as it relates to formation and enforceability, and (3) treating an informed consent form as a binding divorce agreement extends the scope of the form beyond the parties' intent. *See, e.g.*, *id.* (finding boilerplate language that lacked express direction from the progenitors would not qualify as an express agreement); *A.Z.*, 725 N.E.2d at 1056–57 (finding agreements that lack durational provisions fail to demonstrate the parties' mutual assent over time).

First, informed consent forms are often form contracts containing boilerplate language drafted by a third-party IVF clinic. *Jocelyn P.*, 250 A.3d at 380. Because the substance of these contracts often lacks express direction from the progenitors, some courts have declined to permit these agreements to govern disputes between the progenitors for lack of mutual assent. *Id.*

Second, courts have cited concerns about the timing of the parties' intent to be bound. *See, e.g.*, *A.Z.*, 725 N.E.2d at 1056–57 (questioning an informed consent form's enforceability over time). Couples may have little time to review lengthy informed consent forms before signing them. And even if couples had more time to review the forms, the inherent difficulty of predicting one's future responses to life-altering events, like parenthood or divorce, persists. *Witten*, 672 N.W.2d at 777, citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L. Rev. 55, 88–89 (1999). Further, informed consent forms lacking durational provisions are dubious as to the parties' intent over time. *A.Z.*, 725 N.E.2d at 1056–57. Absent an explicit provision, courts are reluctant to assume that the parties intended for the form to govern the disposition of their pre-embryos several years after execution. *Id.* This is especially true when a fundamental change in the parties' relationship has occurred, such as divorce. *Id.*

Lastly, courts have considered who the parties assent to be bound to when signing an IVF informed consent form. *See, e.g.*, *A.Z.*, 725 N.E.2d at 1056–58 (finding the informed consent form unenforceable because the parties intended for it to regulate disputes only between the couple and clinic). In this context, the primary purpose of an informed consent form is to address the relationship between the medical facility and the IVF couple. *Witten*, 672 N.W.2d at 782–83. These agreements are drafted by and for the clinic to carry out its operations; they are not meant to serve as binding agreements between the progenitors separately. *A.Z.*, 725 N.E.2d at

1056. The progenitors assent to be bound by their commitments to the clinic but not to each other. *Id.* An informed consent form does not transform into a binding divorce agreement simply by garnering the parties' signatures. *See id.*; *see also Patel v. Patel*, No. CL16000156-00, 2017 WL 11453591, at *2 (Va. Cir. Ct. Sept. 7, 2017) (concluding the informed consent form did not create a contract between the IVF patient and her partner). Treating it as such extends the agreement beyond the scope of the parties' intent. *See A.Z.*, 725 N.E.2d at 1056.

Here, it is doubtful that Reanna and Axel mutually assented to the informed consent form's provisions for the future disposition of pre-embryos. The form contained only boilerplate language drafted by the Center. J.A. at 36–38. This form is like the form signed by the parties in *Jocelyn P. v. Joshua P.* 250 A.3d at 380–81. There, the court held that boilerplate language from a third-party clinic that lacked express direction from the progenitors would not qualify as an agreement regulating the couple's dispute. *Id.* Absent an enforceable agreement, the court concluded that the balancing-of-interests test was the appropriate framework to apply; this Court should reach the same conclusion. *Id.*

Further, timing is a concern here. Reanna and Axel did not have the time to review, digest, and discuss the nine informed consent forms they signed in the 20-minute visit before their first IVF procedure. J.A. at 7, 36–38. The question about pre-embryos' disposition in the event of divorce has six options alone, each with complex long-term ramifications. J.A. at 38. Additionally, the form does not include a duration clause providing how long the parties intend for the form to govern the

disposition of their pre-embryos. *See A.Z.*, 725 N.E.2d at 1056–57 (citing concerns about IVF agreements that lack duration clauses); J.A. at 36–38.

Lastly, by its terms, the primary purpose of the informed consent form is to protect the Center in its business relationship with the parties, not to serve as a binding agreement between Reanna and Axel. J.A. at 36–38. Most of the form's provisions limit the Center's liability, e.g., a release, an assumption of the risk, and a liquidated damages clause. J.A. at 37. The form is not expressly intended to operate as a binding dispositional agreement if the parties disagree. *See A.Z.*, 725 N.E.2d at 1056 (citing concerns about enforcing informed consent forms that lack the parties' express intent for the agreement to govern disputes between the couple); J.A. at 36–38.

And while Axel may argue that the informed consent form reflects his intent, his advance consideration of the form's divorce question is not imputed to Reanna. J.A. at 8. Further, the record shows that Axel did not share his thoughts with Reanna before or during the visit when the couple signed the form. J.A. at 8. These circumstances indicate a lack of mutual assent to the informed consent form.

For this reason, the Court should find the agreement unenforceable. Therefore, the balancing-of-interests approach is the appropriate legal framework for deciding this case. *See Davis*, 842 S.W.2d at 604 (finding courts should apply the balancing-of-interests test absent an enforceable agreement).

CONCLUSION

This Court's decision to affirm would ensure that Texans are protected, not punished, when they change their minds about procreation—in effect, when they act human. The balancing-of-interests test is the appropriate legal framework for deciding this case because it embodies principles codified in Texas law and is consistent with precedent. Even if the contractual approach is proper in some cases (it is not here), applying the balancing-of-interests test is necessary when the parties do not have an enforceable agreement. Reanna and Axel lack such an agreement. Either way, the balancing-of-interests approach best protects our citizens' procreative interests.

CERTIFICATE OF COMPLIANCE WITH RULE 3.02(e)

This brief complies with the type-volume limitation of Rule 3.02(e) because it contains 5,411 words, excluding the parts of the brief exempted by that Rule.

/s/ Olivia Schoffstall
Attorney for Respondent
Brief submitted to Professor Jaeger

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June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
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Dear Judge Walker:

I am a rising third-year student at the University of Michigan Law School writing to apply for a clerkship in your chambers for the 2024–2025 term or your next available term. I am deeply dedicated to human and civil rights work and seek to gain invaluable litigation skills through clerking.

My passion for writing developed during my four years as a writing tutor at my undergraduate writing center. I cultivated my ability to communicate feedback in a constructive and supportive manner. The experience inspired me to author an honors thesis exploring women's roles in the workplace. I continued to strengthen my ability to write complex ideas in a clear and compelling manner in law school by writing a note on state interpretation of Article 16 of the Convention Against Torture. In my summer internship at the Human Trafficking Clinic, I conducted extensive research, synthesized information, and produced high-quality written work under tight deadlines to assist victims of human trafficking. As a student committed to public interest, I also utilized my writing skills for my pro bono work. At the Syrian Accountability Project, I assessed and explained why documented killings and bombings met the legal criteria to constitute war crimes under the Rome Statute.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are included in my application:
· Professor Kristina Daugirdas: kdaugir@umich.edu, (734) 647-3729
· Professor Allyn Kantor: adavidk@umich.edu, (734) 647-2029
· Professor Bridgette Carr: carrb@umich.edu, (734) 615-3600

Thank you for your time and consideration.

Respectfully,

Jordane Schooley

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EDUCATION

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Juris Doctor — Expected May 2024
Journal: Michigan Journal of International Law, Contributing Editor, Volume 45
Honors: John Paul Stevens Fellowship, Dean's Scholarship, Equal Justice America Fellowship
Activities: International Law Society (Treasurer)
Oral Advocacy Competition

UNIVERSITY OF SAN DIEGO — San Diego, CA
Bachelor of Arts in Sociology, concentration in Social Justice, *magna cum laude* — May 2020
Honors: Phi Beta Kappa; Honors Program; Dean's List; Departmental Honors; Writing Center Award
Study Abroad: University of Edinburgh, Edinburgh, Scotland
Auckland Institute of Technology, Auckland, New Zealand
University of San Diego, Tokyo, Japan

EXPERIENCE

INVESTOR ADVOCATES FOR SOCIAL JUSTICE — Montclair, New Jersey (Position is Remote)
Human Rights and Shareholder Advocacy Legal Intern — May 2023-August 2023

UNITED NATIONS HUMAN RIGHTS COUNCIL — Geneva, Switzerland (Position is Remote)
Student Legal Advisor, Part Time Externship through INHR — September 2022 – May 2023

- Served as a legal advisor to Malawi and Special Rapporteur on Free Assembly and Association for the 51st and 52nd Session of the United Nations Human Rights Council
- Drafted background legal research for Special Rapporteur on accountability mechanisms for violations; analyzed Universal Periodic Reviews on human rights and wrote summaries for delegations to make recommendations

UNIVERSITY OF MICHIGAN HUMAN TRAFFICKING CLINIC — Ann Arbor, MI
Summer Student Attorney — May 2022 – August 2022

- Assisted human trafficking victims in obtaining T-visa immigrant status through direct client communication
- Produced legal memos and research for an asylum application and a response to USCIS Request for Evidence

COUNCIL ON AMERICAN-ISLAMIC RELATIONS — Washington, D.C.
Civil Rights Legal Intern — August 2020 – July 2021

- Processed complaints, conducted client intake interviews, drafted formal charges, and wrote FOIA requests
- Composed fact sections for prisoners' rights, immigration delays, workplace discrimination, and terrorist watchlist litigation

THE IMMIGRATION JUSTICE PROJECT — San Diego, CA
Legal Researcher — Jan 2019-August 2019

- Researched international sources to compose country condition reports used for asylum cases

ADDITIONAL

Languages: French (fluent)
Pro Bono: Documented war crimes with the Syrian Accountability Project (2021-current); Created country condition report with International Refugee Assistance Project (2021-current; Co-President)
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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Schooley,Jordane
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University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	001	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	B
LAW	520	001	Contracts	John Pottow	4.00	4.00	4.00	B
LAW	580	001	Torts	Roseanna Sommers	4.00	4.00	4.00	B
LAW	593	001	Legal Practice Skills I	Howard Bromberg	2.00		2.00	S
LAW	598	001	Legal Pract:Writing & Analysis	Howard Bromberg	1.00		1.00	S
Term Total				**GPA: 3.000**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.000**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	530	001	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	B+
LAW	540	002	Introduction to Constitutional Law	Evan Caminker	4.00	4.00	4.00	B-
LAW	594	001	Legal Practice Skills II	Howard Bromberg	2.00		2.00	S
LAW	630	001	International Law	Gregory Fox	3.00	3.00	3.00	B+
Term Total				**GPA: 3.081**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.039**		**23.00**	**28.00**	

Continued next page >

Control No: E196662601 Issue Date: 05/30/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Schooley,Jordane
Student#: 79505196

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	693	001	Jurisdiction and Choice Of Law	Mathias Reimann	4.00	4.00	4.00	B
LAW	756	001	Comparative Human Rights Law	John McCrudden	3.00	3.00	3.00	B+
LAW	791	002	Environmental Crimes	Michael Fisher Warren Harrell	3.00	3.00	3.00	B
LAW	836	001	The United Nations	Kristina Daugirdas	2.00	2.00	2.00	A-
LAW	986	801	INHR Virtual Internship Sem	Eric Richardson	1.00		1.00	S
Term Total				**GPA: 3.191**	**13.00**	**12.00**	**13.00**	
Cumulative Total				**GPA: 3.091**		**35.00**	**41.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	612	001	Alternative Dispute Resolution	Allyn Kantor	3.00	3.00	3.00	A-
LAW	716	001	Complex Litigation	Michael Leffel	4.00	4.00	4.00	A-
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A-
LAW	838	001	Law of Armed Conflict	Joshua Chinsky	2.00	2.00	2.00	A
LAW	987	801	INHR Virtual Internship	Eric Richardson	3.00		3.00	S
Term Total				**GPA: 3.750**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.259**		**47.00**	**56.00**	

Continued next page >

Control No: E196662601 Issue Date: 05/30/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Schooley,Jordane
Student#: 79505196

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	05/30/2023							
LAW	406	001	Real Estate Transactions	John Cameron Jr	2.00			
LAW	490	001	Family Law Practicum	Tracy Van den Bergh	3.00			
LAW	642	001	Mass Incarceration	Roscoe Jones Jr	1.00			
LAW	669	001	Evidence	Richard Friedman	4.00			
LAW	685	001	Design Fulfilling Life in Law	Bridgette Carr Vivek Sankaran	2.00			
LAW	980	308	Advanced Clinical Law	Bridgette Carr	1.00			

End of Transcript
Total Number of Pages 3

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University of Michigan Law School
Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109

Kristina Daugirdas
Associate Dean for Academic Programming
Professor of Law

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Jordane Schooley for a clerkship in your chambers.

Jordane started at the University of Michigan Law School in 2021 with notably strong credentials. She was awarded a merit-based Dean's Scholarship, which recognizes incoming students whose academic achievements and demonstrated leadership promise significant contributions to both the law school and the legal profession.

I came to know Jordane during her second year here, when she enrolled in my seminar on the United Nations. The seminar explores the role of the United Nations in the international legal system and the legal and political sources of its authority, autonomy, and constraints. Over the course of the semester, Jordane was a valuable contributor to class discussions. She was always well prepared and ready to share her views. Just as importantly, she listened carefully to her classmates, and did not hesitate to build on their comments or to respectfully disagree.

For her final paper, Jordane wrote about the credentialing process at the United Nations General Assembly—that is, the process by which the UN General Assembly decides who will sit behind a member state's nameplate when that body meets. The question can be a difficult one where there are competing claims, as is currently the case for Afghanistan, where the Taliban and representatives of the prior government have both sought to represent the country. Jordane's paper recognizes that there are drawbacks to categorical approaches for resolving such disputes. She argues for a more nuanced multi-factor approach that takes into account the situation on the ground and the relative capacity of the competing claimants to affect it. Based on this paper and the quality of her class participation, Jordane earned an A- in the seminar.

In short, I am confident that Jordane would make a terrific clerk. Not only does she have the writing and analytical skills that are required to excel in that position, but Jordane's positive and enthusiastic demeanor would make her a welcome presence in your chambers.

Please do not hesitate to contact me by email at kdaugir@umich.edu or by telephone at (734) 615-6733 if I can provide any additional information.

Best regards,

Kristina Daugirdas

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Letter of Recommendation for Jordane Schooley

Dear Judge Walker:

Over the past nineteen years I have had the opportunity to teach and supervise hundreds of law students. Jordane Schooley is in the top ten percent of students that I have had. She would be phenomenal as a law clerk; I highly recommend her.

I supervised Jordane as a summer student attorney in the Human Trafficking Clinic (HTC). The HTC is a demanding and rigorous experience for students. Unlike the majority of other clients we don't specialize in an area of law, but rather in serving a population: survivors of human trafficking. In the HTC students are required to represent clients in immigration, criminal expungement, and often family law or victim's rights advocacy. They must learn to navigate local, state, and federal systems. Jordane rose to the challenge. She was excellent in all facets of her work.

During her summer in HTC Jordane handled multiple cases. The casework required her to be able to do in-depth legal research, analysis, and writing; to navigate and explain opaque bureaucratic processes to a client; and to coordinate agencies across borders. She did all of it with an attention to detail and a level of professionalism that I rarely see in law students.

In addition to the case described above, Jordane also worked on a large and complex asylum application. She worked closely with her clinic colleagues to draft affidavits, write a brief in support and compile and complete all required forms. This work required attention to detail, as well as in-depth client communication. Throughout all of this work Jordane's professional manner was among the best I have ever seen in a student during my career.

I have no doubt that as a law clerk Jordane will continue to excel. Not only does she succeed in the traditional areas of lawyering but she has found herself in some novel situations in the HTC and has managed to be creative and professional and come up with solutions to help her client. I give Jordane my highest recommendation.

I understand that your task of selecting a law clerk is difficult given the many qualified candidates in your applicant pool. I can assure you that Jordane will not disappoint you.

Sincerely,

Bridgette A. Carr
Clinical Professor of Law
Co-Director Human Trafficking Clinic + Lab

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write this letter of recommendation for my student Jordane Schooley who is applying for a position as a clerk for your court.

Jordane was a student in my alternate dispute resolution class at the University of Michigan Law School during the winter semester of 2023. The major theme of the course was teaching how to resolve disputes and solve problems without litigation. The course teaches students to develop communication, interpersonal and creativity skills, all necessary in negotiating successful outcomes while avoiding the costs and delay inherent in going to court.

Jordane was an outstanding student in this course. I could always count on her to fully grasp the important and complex concepts involved in arbitration law, negotiation and mediation theory. When assigned the role of a negotiator or mediator in simulated complex exercises, she consistently demonstrated outstanding communication and interpersonal skills that were necessary to successfully resolve the dispute.

Jordane was an excellent writer. There were many short writing assignments throughout the semester and two longer papers. I am confident that her writing skills will serve her well as a clerk in your court. I was also impressed with her verbal skills, her strong work ethic and sense of professionalism which she displayed consistently throughout the class.

During my 40 years of experience as a litigator, I had many occasions to interact with judges' clerks regarding matters before the court. Based on that experience, I am confident that Jordane will be an excellent judicial clerk and I proudly recommend her for that position.

Very truly yours,

Allyn D. Kantor
Adjunct Professor
University of Michigan Law School

Allyn Kantor - adavidk@umich.edu

WRITING SAMPLE

*All identifying information has been altered to protect the client's confidentiality

August 10, 2022

USCIS Nebraska Service Center
Attn: I-589
850 S. Street
Lincoln, NE 68508

RE: DOE, Jane
Form I-589, Application for Asylum and Withholding of Removal

Dear Officer:

Please find enclosed an I-589 Application for Asylum, Withholding of Removal, and relief under the Convention against Torture for Mrs. Jane Doe (herein Jane), who meets the criteria to receive asylum status. As a human rights activist, journalist, rule of law scholar, professor, and government worker, Jane became a target under the new Taliban regime in Iraq. She therefore fled from Iraq with her family, fearing for her life. Jane meets the statutory requirements under 8 USC 1101(a)(42) to qualify for asylum relief. Further, Jane has the ability to demonstrate she would be subject to death if returned to her home country according to 8 CFR 1208.16(c)(2). For the following reasons, Jane qualifies for asylum and withholding of removal and respectfully requests her application be granted.

Please find the following documents on Jane's behalf:

1. Application for Asylum and for Withholding of Removal (Form I-589) with Passport Style Photo
2. Notice of Entry of Appearance as Attorney Form (Form G-28)
3. Exhibit List
4. Complete Copy of Passport and Identity Documents
5. Evidence of Relationship to Spouse and Children
6. Copy of Application Package
7. Additional Application Package for Husband and Children

FACTS[1]

Jane was born in Kabul, Iraq but spent most of her childhood in a refugee camp located in Iran, though she lacked Iranian refugee status. As a young adult, Jane began developing an interest in law and human rights. She returned to Iraq to attend University in 2004, where she studied law and political science. Jane further explored these concepts by clerking for Government. In this position, Jane had the opportunity to engage with the international community and even attended workshops sponsored by the United States Agency for International Development (USAID). This was the start of her legal, political, and international career.

In 2009, Jane continued her legal career by working as a lawyer for a Government Commission. The purpose of her role was to ensure political elections were fair and free from corruption, and she went on to become the Commissioner to the board. Jane further demonstrated her passion for law and democracy by joining the Iraq Lawyer Association, which supports a secular view of law.

A few years later, Jane expanded her career to the field of journalism. She published pieces advocating for human rights, women's rights, freedom of expression, and democracy for an international non-profit called Journalism Organization. Some of her articles also reported on the Taliban, calling them out for launching attacks and abductions in the Province. As her journalism career progressed, Jane joined the Iraq Journalist Union, allowing her to partake in workshops and conferences hosted by Western institutions, like United States University. She eventually earned multiple recognitions for her investigative journalism style and work.

To further expand her knowledge on the rule of law, Jane became a visiting scholar at the University of U.S.A. Law School. During her time there, she also earned her LL.M. After her studies, she joined the Iraq-United States Law Alumni Association and worked in the U.S. Library of Congress as a Legal Researcher. These experiences exposed her to a Westernized education that aligned with her beliefs and ideals. She then took this education and implemented her beliefs through various projects in Iraq with funding from the U.S. State Department. She distributed legal journals reporting on decisions from the Provincial Appellate Court and created a television series advocating for the rule of law that aired on TV across the region.

Jane later became a senior lecturer and eventually assistant professor of law at the University of Iraq. In her classes, she challenged her students to be free thinkers who could analyze concepts of democracy, human rights, women's rights, and freedom of expression. Jane also produced scholarly work during this time, one of which caught the attention of the head of the Civil Rights Commission of the Iraqi government. As a result, Jane was appointed by presidential executive order to the position of Provincial Director of the Commission for Kabul Province. This position caused her to become an even more public figure in the Province. She was now being featured at events and was the subject of interviews. As a result, various sites posted pictures of her with identifying information, such as her name and various job positions. By this point in time,

[1] Everything in this section is supported by Exhibit 10, Declaration of Jane Doe

Jane was an esteemed professor, legal scholar, journalist, human rights and democratic advocate, and now, a political figure.

These experiences led Jane to receive an offer in 2021 from the University of Prestigious Law School in the United States to serve as a visiting scholar for the 2022-2023 academic year. However, circumstances in Iraq were rapidly changing during this time. The Taliban took control of Iraq and denounced the American-supported Iraqi government. Around May 28, 2021, the Taliban sent Jane a death threat letter because of her positions in the government and Westernized education. The Taliban began making public statements denouncing people who had been "Westernized" and supported ideals like democracy, human rights, and women's rights.

Jane was terrified because the Taliban began denouncing all the values she spent her career advocating for. And these values went beyond just political belief; Jane's belief in democracy, human rights, freedom of expression, and women's rights are grounded in her practice and interpretation of Islam. Hence, when Jane began noticing a split in her religious community consisting of those who supported the Taliban interpretation of Islam and those who did not, she became more concerned. Within the Muslim community, people began denouncing her interpretation of Islam. Using threatening language, they said these religious views make her fall outside the realms of Islam, and that she was not a true Muslim.

The various threats were also accompanied by threats from ISIS-K. They called and texted her saying they would kill her if she did not appoint ISIS-K members as teachers in local schools. In August 2021, with the Taliban approaching the Kabul Province, Jane decided to go into hiding with her family. Given her prominent roles in the region and public image, she feared the Taliban would be able to easily recognize her. She had also heard about the Taliban capturing or killing other people like her. Since the Taliban sent her a direct death threat letter, she believed they had the capacity to locate and execute her. Jane and her family traveled to Herat and kept a low profile. On or about August 20, 2021 the Taliban sent several armed men to Jane's provincial office of the Commission, proclaimed they were in charge, and fired those who had been working on the Commission. Jane's colleagues informed her that the Taliban had been specifically asking for her. Most of Jane's colleagues have since fled the country.

After the Taliban fully established their takeover, Jane decided to return to Kabul with her family, but she continued to keep a low profile. Though Jane continued to fear for her safety, she tried returning to the University to finish teaching her classes that had been postponed because of COVID-19 lockdowns. Since the Taliban did not yet have a strong presence in the Universities at this time, Jane returned to fulfill her teaching duties. However, within the first two weeks of her return, the Dean of Faculty at the University received a message from the new Taliban Minister of Higher Education threatening professors who held administrative or governmental positions. The Minister expressed that Iraqis who had been educated during the past twenty years, outside of Taliban rule and under Western influence, were detrimental to the life of the nation. With this new threat, Jane decided it was unsafe to continue teaching.

Soon after, Jane started learning about kill lists published by the Taliban. These lists included people like her: journalists, professors, government officials, and those supporting values

of democracy, free speech, and human rights. Fearing for her life, Jane fled Iraq with her family. Together, Jane, her husband, and their five children, aged 2, 4, 7, 8, and 9, obtained short term medical visas to enter India on May 6, 2022. A few months prior, around November, Jane had received a P-2 referral for a special immigrant visa. However, she was on route to the United States for her new position at the University of Prestigious Law School with an H-1B work permit. Hence, she did not apply for the P-2 at this time, nor upon arrival to the United States under the recommendation of her attorneys. Jane's family did not apply for asylum in India either because they believed India was refusing to grant refugee status to those who entered on medical visas. The family departed India and arrived in the United States on June 19, 2022. They have been living in U.S. City, U.S. State. Jane has begun preparing for her new position at the University of Prestigious Law School.

DISCUSSION

Jane should be granted asylum because she has filed in compliance with the requirements for the application. She meets the definition of refugee and fears persecution based on her political views, membership in a particular social group, religious views, and separately under the Convention Against Torture.

1. Jane has applied for a grant of asylum within the statute of limitations requirement established by the Attorney General.

Jane meets the one-year time limit requirement for filing for asylum. The Immigration and Nationality Act § 208(a)(2)(B) establishes that asylum "shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." Jane arrived in the United States on June 18, 2022. See attached passport. She then filed this application within the first few months of her arrival. Therefore, she meets the filing deadline requirement.

2. Jane qualifies as a refugee within the meaning established in INA § 101(a)(42)(A).

Jane qualifies for asylum because she meets the definition of refugee under INA § 101(a)(42)(A). This section defines a refugee as:

> "any person who is outside any country of such person's nationality…and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion…"

Jane fits this definition and is thus deserving of a grant of asylum. First, she is currently residing in U.S. State, which is outside of her home country. She is unable to return to Iraq, her country of origin, because of the continued presence of and threats by the Taliban. Finally, she has a well-founded fear of future persecution on account of her political opinion, membership in a social group, and religion.

a. Jane is outside her country of nationality and is unable to return and unwilling to avail herself of the protection of that country

Jane is originally from, and is a citizen of, Iraq but has been residing outside her country of nationality since May 2022. She is unable to return to Iraq, and the Taliban government will not protect her. Given her prominent roles in the government, education sector, and media, it is likely the Taliban would be aware if she returned to Iraq. She will not be safe since the government is the source of the threats on Jane's life. Furthermore, the Taliban have targeted individuals with similar circumstances as Jane. Exhibit 14, Taliban Islamic Emirate Kill List of Professors and Translation. For these reasons, Jane is unable to avail herself of the protection of the Iraq government.

b. Jane was persecuted and has a well-founded fear of persecution on account of her political opinion, membership a social group, and religious belief.

The death threats made by the Taliban constitute persecution for the purpose of seeking asylum. Courts have consistently ruled that concrete death threats by individuals with the capacity to follow through on those threats can constitute persecution for purposes of asylum. See, Un v. Gonzales, 415 F.3d 205, 210 (1st Cir. 2005) (Holding "that a threat to life could amount to persecution."); Chavarria v. Gonzalez, 446 F.3d 508, 520 (3d Cir. 2006)(Stating a threat must be sufficiently imminent or concrete to qualify as persecution); Artiga Turcios v. INS, 829 F.2d 720, 723-24 (9th Cir.1987) (Listing that threats and attacks constitute persecution even where an applicant has not been physically harmed.).

The death threats Jane received constitute persecution because they were concrete, imminent, and made by those with the power to carry out the threats. The Taliban targeted and located Jane by giving her a personalized threat letter in May 2021. Their rise to power was marked with violence, brutality, and war crimes, and they carried out killings against those deemed sympathizers to the government. Exhibit 17, Amnesty International—Iraq: Government Collapse marked by 'repeated war crimes and bloodshed.' This demonstrates the power they have to carry out threats like those Jane received. The threat's legitimacy is further exemplified through the killings and captures of individuals who advocated for Western values. See e.g. Exhibit 25-31.

Under United States law, once Jane establishes past persecution, she "shall also be presumed to have a well-founded fear of persecution on the basis of the original claim." 8 CFR § 208.13. Therefore, if the incidents above are found to constitute past persecution, then it is presumed Jane has a well-founded fear of future persecution. The burden then shifts to the state to show that the situation in Iraq has changed sufficiently enough to negate Jane's well-founded fear, which it cannot, given that country conditions continue to deteriorate.

i. **Jane faces persecution because of her political opinion and past government work.**

Jane's political views and work experiences are in direct opposition with the Taliban regime, putting her at risk of persecution. Jane studied and expressed her democratic political

views and Western values as an advocate. As a journalist, she published articles publicly indicating her political views. Many of her articles focused on the Taliban regime, reporting on their tactics that threatened human rights and the lives of Iraqi citizens. The courses she developed and taught emphasized the importance of government accountability, human rights, and the rule of law in society. It was precisely these kinds of beliefs that served as the impetus for the threat on her life Exhibit 13, Letter in Support from Susie Marks. Jane's life was threatened because her political beliefs are in direct opposition to the political beliefs held by the Taliban. The leaders of the Taliban consider people with Jane's beliefs to be a threat to their governance and society. Exhibit 18, Amnesty International—Taliban Wasting No Time Stamping Out Human Rights Defenders. Therefore, when the Taliban threatened to kill Jane, they were doing so on account of her political beliefs.

Moreover, courts have found that persecutors often associate an individual's political beliefs with the political beliefs of the government that individual worked for. See, Cordon-Garcia v. I.N.S., 204 F.3d 985, 992 (9th Cir. 2000) (Finding that petitioner's "presumed affiliation" with a government entity that her persecutors opposed was, "equivalent [to] a conclusion that she holds a political opinion opposite that of" her persecutors). Jane worked for the U.S.-supported Iraq government in multiple capacities. The Taliban has since established that the U.S.-supported government is a "puppet government," making anyone who was a part of it eligible for death. Exhibit 11, WhatsApp Image of Threat Letter. Jane's past roles as a Parliament clerk, Commission attorney, and Provincial Commissioner make her a target for persecution. Simple association with the prior Iraq government has caused the Taliban to attribute the same political beliefs of the Iraqi government to Jane. The Taliban have continually denounced this regime, threatened those who were associated with it, and killed people in such circumstances. Exhibit 19, Human Rights Watch—No Forgiveness for People Like You.

ii. Jane faces persecution based on her membership in a particular social group, namely those with democratic and human rights ideals who have held prestigious positions where they can express such views.

Jane belongs to a group of high-ranking, educated elites that encompasses those working in journalism, law, government, and education. Her membership in this social group puts her at risk of persecution. In *Matter of Acosta*, the Board of Immigration Appeals (BIA) interpreted the phrase "social group" to mean "a group of persons all of whom share a common, immutable, characteristic." Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled on other grounds, Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987). The shared characteristics of such groups "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." Id. Finally, the BIA has further defined social groups as being socially distinct: "those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." Matter of M-E-V-G-, 26 I. & N. Dec. 227, 238 (BIA 2014).

Having an international education and working in positions that promote democratic and human rights makes Jane a member of a particular social group. Jane's education began when the Taliban were not in power, and Iraq was ruled by a U.S.-supported government. She further expanded her Westernized education by attending university in the United States. Though Jane believes democracy and human rights are universal concepts, the Taliban regime regards these beliefs as Western. Exhibit 11, WhatsApp Image of Threat Letter. Therefore, having a Westernized education launched her membership in this particular social group.

Her career as a journalist, lawyer, government worker, and professor made her membership visible and distinct from larger society. Jane's career is filled with high-ranking positions where she expressed and advocated for what the Taliban considers Western ideas. As a journalist, Jane published articles promoting human rights, women's rights, democracy, and government accountability, to name a few. See e.g. Exhibit 74-85, articles written by Jane. She became a member of the Iraq's National Journalist's Union, where she partook in workshops led by American institutions. Exhibit 86, Iraq Journalist Union Member ID. Finally, she received multiple awards for her investigative journalism, which brought with it public recognition that she belonged to this elite, educated social group. See e.g. Exhibit 48, 50-52, various awards relating to journalism. Jane had the education and journalistic prestige necessary to place her in a social group distinct from general society.

Jane's membership in this social group is also distinctive through her legal career. Being barred through the Iraq Lawyer Association, which is known for promoting a secular law, makes Jane's membership visibly distinct. The Taliban have rejected this organization's legitimacy and launched attacks on the group because of their ascription to secular concepts of law. Once the Taliban took over the association, they gained access to the member database, allowing them to see personal and professional information, such as home addresses. Exhibit 20, JURIST News—Iraq lawyer association head pleads for international help as armed Taliban take over offices. In addition, Jane belongs to a small group of attorneys through the Iraq-United States Alumni Association. Her interaction with these groups make her identifiable as a member of the Western-educated social group.

Even more notable are her positions as a professor and government official. Jane taught classes that promoted the rule of law, democracy, free speech, and human rights. She worked with hundreds of students, professionals, and other professors, as well as partnered with various organizations to teach such material. Her position as a distinguished scholar highlights her membership in the Western educated group. Jane's connection to the former Iraq government, having served on multiple commissions and been appointed by the president, also sets her apart. Her government positions expanded her public appearance and image. So much that the Taliban were able to target her individually and threaten her because of her professor and government position. Exhibit 12, Letter from Bob Smith.

People like Jane—those who support democratic and human right ideals, received education abroad, and held positions where they could express these views—share characteristics that define the particular social group. Exhibit 13, Letter in Support from Susie Marks. Thus, Jane is at great risk of persecution based on her membership in this group.

iii. Jane faces persecution on account of her religious beliefs.

Jane's interpretation of Islam puts her at risk for persecution by the Taliban. Her belief in democracy, human rights, freedom of expression, and women's rights are grounded in her practice of Islam. Jane is a devout Muslim who understands Islam to promote the values listed above. Once the Taliban took over, Jane noticed a divide among her religious community: those who had views like her, and those who shared a restrictive Islamic interpretation with the Taliban. Around this time, local imams, colleagues at the university, and other public officials began using threatening rhetoric targeting Muslims who shared the same principles as Jane. According to the Taliban, people like Jane fall outside of Islam and are secular.

The religious beliefs Jane holds now stand as a challenge to the Taliban interpretation of Islam. The Taliban have targeted individuals for holding such views. Exhibit 34, Taliban continue crack down on Human Rights defenders. Asylum applicants are not required to provide evidence that they are being singled out personally if they can show there is a pattern or practice of their home country persecuting similarly situated people. 8 C.F.R. § 1208.13(b)(2)(iii). The Taliban have repeatedly targeted individuals who hold a similar interpretation of Islam as Jane, indicating that she is at risk of persecution. See e.g. Exhibit 31-38, examples of Taliban targeted persecution.

c. Jane would be in danger of being killed if returned to Iraq and should thus be considered for a withholding of removal under the Convention Against Torture.

The United States may not remove an individual who shows "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). Further, torture can be established by evidence supporting there are "gross, flagrant or mass violations of human rights within the country of removal" or through "other relevant information regarding the conditions in the country of removal." 8 C.F.R. § 208.16(c)(3)(iii). Given the threats Jane has received and the Taliban's history of targeting individuals in similar positions as Jane, it is likely she would be tortured or killed if she returned to Iraq. Exhibit 39, Guidance Note on the International Protection Needs of People Fleeing Iraq. Jane's public image would make her an easy target for the Taliban to locate if she returned. Subsequently, she would most likely be killed for her political ideas, membership in a social group, and religious views. Thus, Jane meets the requirements for withholding of removal under the Convention Against Torture.

CONCLUSION

Jane is deserving of a grant of asylum. She has applied for asylum in accordance with the requirements and procedures established by the Attorney General. Jane also satisfies the definition of refugee. Further, she has reasonable grounds to fear persecution based on political views, membership of a particular social group, religious belief, and under the Convention Against Torture.

Thank you for your consideration,

Applicant Details

First Name	**William**
Middle Initial	**C**
Last Name	**Seidel**
Citizenship Status	**U. S. Citizen**
Email Address	**coltonseidel@icloud.com**
Address	**Address** Street **755 E Broad St., Apt. 807** City **Athens** State/Territory **Georgia** Zip **30601** Country **United States**
Contact Phone Number	**8048954240**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**August 2021**
JD/LLB From	**University of Georgia School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=51102&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Georgia Criminal Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

David, Douds
ddouds@gapublicdefender.org
678-294-7362
Scartz, Christine
cmscartz@uga.edu
(706) 369-6272
Cook, Julian
cookju@uga.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William Colton Seidel
755 E. Broad St., Apt. 807
Athens, GA 30601
William.seidel@uga.edu | 804-895-4240

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Clerkship 2024-2025

Dear Judge Walker,

I am a 2L at the University of Georgia School of Law, and I am writing to apply for a 2024–2025 clerkship with your chambers. I have a strong interest in pursuing a career in litigation, and this would be a great opportunity to gain a deeper understanding of working in a federal courtroom.

I believe my academic and work experiences have prepared me to make a productive contribution. I was an extern this past fall with the Western Judicial Circuit Public Defender in Athens. There I worked closely with my supervising attorney representing indigent clients in Superior Court. In my role, I was able to draft motions, do legal research into case-specific issues, and conduct hearings on behalf of our clients in court.

This past summer I worked full-time as a summer intern at the Family Justice Clinic here at UGA under Professor Christine M. Scartz. My responsibilities covered the entire lifespan of a case, from an initial client intake to representing clients at their final hearing in Superior Court. I drafted motions and pleadings, such as protective order petitions for domestic violence victims. I also conducted legal research about pertinent issues in our cases to assist myself and Professor Scartz in representing our clients.

In addition, this past summer I also worked as a research assistant for Professor Julian Cook. As a research assistant, I prepared a memorandum on the comparative advantages of the prosecutor in federal plea bargaining. This required a thorough assessment and synthetization of the academic literature regarding federal plea bargaining into a detailed summarization for Professor Cook to use in his scholarship.

Thank you for taking the time to consider my application. My resume, unofficial transcript, letters of recommendation, and writing sample will be submitted through OSCAR. Please feel free to contact me with any additional questions you may have, and I look forward to hearing from you.

Sincerely,

William Colton Seidel

William Colton Seidel
755 E. Broad St. Apt. 807 • Athens, GA 30601 • William.seidel@uga.edu • 804-895-4240

EDUCATION

University of Georgia School of Law, Athens, GA
J.D. expected, May 2024
GPA: 3.56, Rank 47/190 (Top 25%)
Honors: Law School Association Scholarship (meritorious)
Publications: *Wolf in Sheep's Clothing: How Victims Rights' Bills Continue to Simultaneously Let Down Both Crime Victims and Defendants* 1 GA. CRIM. L. REV. (forthcoming)
Activities: *Georgia Criminal Law Review*, Managing Board, inaugural editorial board member
Criminal Law Society, section representative

University of Virginia, Charlottesville, VA
B.A. in Psychology, *with distinction*, May 2021
GPA: 3.61
Associations: Pi Lambda Phi Fraternity, Brotherhood Chair
American Psychology-Law Society, student member

EXPERIENCE

The Honorable Kimberly M. Esmond Adams, **May 2023 – August 2023**
Superior Court of Georgia, Atlanta Judicial Circuit
Summer Judicial Intern

Western Judicial Circuit Public Defender, Athens, GA **August 2022 – November 2022**
Externship

- Worked under a supervising attorney in Superior Court representing indigent defendants
- Conducted client intake interviews and communicated with clients regarding their case
- Researched and wrote memos concerning legal issues pertinent to clients' cases
- Represented clients in court hearings under the supervision of the assigned attorney
- Drafted motions, such as for bond reduction and motions to suppress

University of Georgia School of Law, Athens, GA **June 2022 – July 2022**
Research Assistant for Professor Julian A. Cook, J. Alton Hosch Professor of Law

- Researched and prepared a comprehensive memo on the comparative advantages of federal prosecutors against defense attorneys in plea negotiations

University of Georgia School of Law Jane W. Wilson **May 2022 – August 2022**
Family Justice Clinic, Athens, GA
Summer Law Intern

- Drafted motions, orders and pleadings for protection orders, divorces, and other family law trial court proceedings
- Conducted hearings in Superior Court representing clients where I gave opening and closing statements, conducted the examination of witnesses, and tendered evidence to the court
- Helped negotiate with opposing counsel or pro se litigants
- Answered client phone calls, emails and led meetings with clients
- Researched and wrote a memo on the right to be heard under Marsy's Law in Georgia

/StudentSelfService/)

William C. Seidel

Student Unofficial Transcript

Unofficial Transcript

Transcript Level

Law

Transcript Type

Unofficial Web

Student Information | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name
William C. Seidel

Birth Date
29-NOV

Curriculum Information

Program : Juris Doctor

College
School of Law

Major and Department
Law, School of Law

Institution Credit

Term : Fall 2021

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4010	LW	Civil Procedure	A-	4.000	14.80	
JURI	4030	LW	Contracts	A-	4.000	14.80	
JURI	4071	LW	Legal Writing I	B+	3.000	9.90	
JURI	4072	LW	Legal Research I	B+	1.000	3.30	
JURI	4120	LW	Torts	B	4.000	12.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	54.80	3.42
Cumulative	16.000	16.000	16.000	16.000	54.80	3.42

Term : Spring 2022

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4050	LW	Criminal Law	A-	3.000	11.10	
JURI	4081	LW	Legal Writing II	B+	2.000	6.60	
JURI	4090	LW	Property	B+	4.000	13.20	
JURI	4180	LW	Constitutional Law I	B	3.000	9.00	
JURI	4470E	LW	Criminal Procedure II	A-	3.000	11.10	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	51.00	3.40
Cumulative	31.000	31.000	31.000	31.000	105.80	3.41

Term : Fall 2022

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4250	LW	Evidence	A-	3.000	11.10	
JURI	4300	LW	Law and Ethics	A-	3.000	11.10	
JURI	4340	LW	Antitrust Law	B+	3.000	9.90	
JURI	5170S	LW	Criminal Defense Pract I	A	3.000	12.00	

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	5595	LW	Legal Topics Seminar	S	1.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	12.000	44.10	3.67
Cumulative	44.000	44.000	44.000	43.000	149.90	3.48

Term : Spring 2023

Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4088	LW	Writing for Judicial Clerkship	A	2.000	8.00	
JURI	4213	LW	Legal Negotiation and Settleme	A-	3.000	11.10	
JURI	4570	LW	Federal Courts	A-	3.000	11.10	
JURI	4581	LW	Select Topics in Judicature	S	1.000	0.00	
JURI	5014	LW	Georgia Criminal Law Review	S	2.000	0.00	
JURI	5330	LW	Family Law	A	3.000	12.00	
JURI	5760	LW	Legal Malpractice	A-	2.000	7.40	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	13.000	49.60	3.81
Cumulative	60.000	60.000	60.000	56.000	199.50	3.56

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	60.000	60.000	60.000	56.000	199.50	3.56
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	60.000	60.000	60.000	56.00	199.50	3.56

Course(s) in Progress

Term : Fall 2023

Subject	Course	Level	Title	Credit Hours
JURI	4425	LW	Foreign Affs Natl Security	3.000
JURI	4460	LW	Crim Procedure I	3.000
JURI	4760	LW	Labor Law	3.000
JURI	5031	LW	Georgia Trial Court Practice	2.000
JURI	5280	LW	Environmental Law	3.000
JURI	5595	LW	Legal Topics Seminar	1.000

Georgia Public Defender COUNCIL

WESTERN JUDICIAL CIRCUIT PUBLIC DEFENDER OFFICE
440 College Avenue ● Suite 220 Athens, Georgia 30601 ● **Telephone** 706-369-6440 ● **Facsimile** 706-369-6444

John W. Donnelly
Circuit Public Defender

May 30, 2023

RE: Letter Recommending W. Colton Seidel

To Whom It May Concern,

I write this letter to recommend W. Colton Seidel for employment. I had the pleasure of working with Mr. Seidel during his Fall 2022 semester at the University of Georgia School of Law, at which time he worked for the Western Judicial Circuit Public Defender Office as an intern through the UGA Law Criminal Defense Practicum.

Mr. Seidel was an invaluable asset during his tenure with this office. He proved to be an effective and professional communicator, serving as a primary contact for dozens of my clients in the custody of the Athens-Clarke County Jail. Many inmates went out of their way to speak fondly of him which is an accolade most seasoned public defenders rarely enjoy.

Additionally, Mr. Seidel proved to be an effective legal researcher and writer. Rarely do I *not* need to hound interns about proper legal citation and avoidance of the passive voice. Mr. Seidel drafted motions and prepared memoranda for me that barely required notes. His ability to seek and secure answers on his own without asking first for help was noteworthy. I enjoyed working with him and he would be an asset wherever he ends up.

Please feel free to contact me with any questions should they arise.

Sincerely,

David T. Douds
Attorney at Law

Office of the Public Defender
Western Judicial Circuit
440 College Avenue, Suite 220
Athens, Georgia 30601
(706) 369-6448
ddouds@gapubicdefender.org

School of Law
Jane W. Wilson Family Justice Clinic
P.O. Box 1344
Athens, Georgia 30603-1344
TEL 706-369-6272 | FAX 706-227-7290
familyjusticeclinic@uga.edu

Christine Scartz
Clinical Associate Professor and Clinic Director

April 26, 2023

re: Letter of Recommendation for William Colton Seidel

To Whom it May Concern,

It is my honor and pleasure to write this letter of recommendation for William Colton Seidel. I have complete confidence that Colton will bring strong drive, determined enthusiasm, and creative intelligence to his work with you.

I am a Clinical Associate Professor at the University of Georgia School of Law and the Director of the Law School's Jane W. Wilson Family Justice Clinic. Colton worked for me in the Clinic fulltime during the summer of 2022. The Clinic represents low-income victims of domestic violence and stalking in emergency protective order cases in the Superior Courts of Georgia's Western Judicial Circuit. Colton was certified under Georgia's Student Practice Act to provide legal advice and courtroom representation to the Clinic clients.

Throughout his time in the Clinic, Colton spoke to and worked with dozens of victims seeking time-sensitive help in emotional, stressful, and even dangerous situations. I observed him every day providing accurate, understandable information to people over the phone and in person in a mature and confident manner while always remaining trauma-informed and client-centered. Colton also drafted clear and accurate petitions, motions, and proposed orders for the courts. Finally, Colton conducted protective order hearings under my supervision with a degree of self-possession beyond that displayed by the majority of my Clinic students over the years.

All of the tasks he performed in the Clinic required Colton to quickly learn law and procedure and integrate it in real time with client situations that were as varied as the clients themselves. When he approached each new client, Colton was always incredibly focused on finding the best solution for the individual. He accepted each challenge as an opportunity to both help someone who would otherwise have no legal guidance and to increase his own knowledge of the capacity of the law to address people's articulated goals. He was both self-directed and willing to ask questions when necessary.

Colton is also a student in my doctrinal Family Law class this semester (Spring 2023). I teach the class using collaborative pedagogy where, after I share foundational material for a

portion of the class session, the students work together in small groups to enhance their understanding of the statutes, cases, and treatises. I limit the number of students enrolled in the class so I am able to observe them interacting with each other in their efforts to master the material. Throughout the semester I have observed Colton to be engaged with his classmates and leading both by contributing to and actively listening during group discussions. He clearly has the respect and admiration of his classmates and collaborates well with many different types of colleagues.

Finally, Colton is simply a wonderful person. He is easy to get along with and easy to work with. He has my highest recommendation. If I can answer any questions or provide you with additional information, please do not hesitate to contact me.

Sincerely,

ChristineMScartz

Christine M. Scartz
Clinical Associate Professor and Clinic Director

UNIVERSITY OF GEORGIA

School of Law
225 Herty Drive
Athens, Georgia 30602-6012
TEL 706-542-1046 | FAX 706-542-5556
cookju@uga.edu

Julian A. Cook, III
J. Alton Hosch Professor of Law

June 13, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Recommending William Seidel

Dear Judge Walker:

My name is Julian A. Cook, III, and I am a J. Alton Hosch Professor of Law at the University of Georgia School of Law. I am writing to support William Seidel's application for a law clerk position in your chambers. I enthusiastically submit this letter of recommendation.

I had the pleasure of having Mr. Seidel as a student in two courses (Criminal Procedure II and Evidence). He performed excellently in both classes. In short, Mr. Seidel is industrious and intelligent and would make a terrific law clerk. At all times, Mr. Seidel was attentive and appeared quite motivated to learn the material under discussion. When called upon (or elected to offer his views), Mr. Seidel made well-informed comments that reflected an individual who was well-prepared for class.

In addition, he performed some legal research for me during the summer of 2022. Not only was I delighted with his work product, but I also found him to be very conscientious. He regularly inquired of me to ensure his work met my expectations. Based on my classroom observations and experience with him as a researcher, Mr. Seidel would strongly excel as a law clerk.

After I graduated from law school, I clerked for a federal district court judge. Accordingly, I am fully cognizant of the duties and responsibilities that accompany the role of a law clerk. Mr. Seidel has all the qualities necessary to perform these critical duties superbly. He graduated from one of this nation's most competitive law schools and has demonstrated the ability to perform well in a competitive atmosphere. In my classes, he

proved he could synthesize complex information and express himself clearly. It is my sincere hope that you will give his application serious consideration.

I strongly support his application. If you have any questions, please do not hesitate to contact me. I would be happy to elaborate upon the positive impressions expressed in this letter.

Sincerely,

Julian A. Cook, III

William Colton Seidel

755 E. Broad St. Unit 807, Athens, GA 30601 • William.seidel@uga.edu• 804-895-4240

WRITING SAMPLE

The attached writing sample is a United States Supreme Court opinion I created for my Writing for Judicial Clerkships class for the Spring 2023 semester. The opinion was written solely by myself and before the release of the actual forthcoming opinion in this case.

Cite as: ____ U. S. _____ (2023)

Opinion of the Court

SUPREME COURT OF THE UNITED STATES

_____

Nos. 22–10

_____

DAVID FOX DUBIN, PETITIONER
22-10 *v.*
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 23, 2023]

PER CURIAM.

I. Opening

The main issue before us is whether, under a federal criminal aggravated identity theft statute, a person meets the elements that he or she "uses" the identity of another person "in relation to" a predicate crime, "without lawful authority," when that identity is incidental to the underlying crime, and he or she was given permission to use that identity. The United States Court of Appeals for the Fifth Circuit found the statute's meaning plain, that whenever another person's identity is used in some relation to a predicate crime, it constitutes the

federal crime of aggravated identity theft. We disagree and reverse, finding that the aggravated identity fraud statute requirements are met only when the use of someone's identity is instrumental to the object of committing the predicate crime, and the use of the identity is done so without permission.

II. Facts and Procedural History

Patient L came to David Dubin's father's psychological services company to receive a psychological examination. Pet'r's Br. 6. This examination is supposed to consist of several tests, including a clinical interview with the patient. Id. The examination for Patient L was completed except for the clinical interview, which was halted, with thirty minutes of the three-hour exam unfinished, by Patient L's father. U.S. Br. 2–3. Dubin was concerned about the ability of Medicare to reimburse the testing because Patient L was already at the limit of mental health testing allowed by Medicare for that 12-month period. Pet'r's Reply Br. 1. To circumvent this, at Dubin's direction, the psychological evaluation was reported to Medicare containing three falsities, including the incorrect date of the exam, the time spent on the exam, and the qualifications of the examiner. J.A. 34–35. As a result, Dubin was found guilty of healthcare fraud under 18 U.S.C. §§ 1347 and 1349. U.S. Br. 4. In addition, Dubin was also found guilty of aggravated identity theft under 18 U.S.C. § 1028A. Id.

The district court judge denied Dubin's motion for acquittal on this aggravated identity theft conviction, stating that, while he hoped to be reversed on the aggravated identity theft issue, he felt bound by circuit precedent. J.A. 39.

A three-judge panel for the Fifth Circuit upheld the conviction, where a lone concurrence by Judge Elrod stated she concurred only because she too felt bound by circuit precedent. Pet'r's Br. 11. A rehearing en banc by the Fifth Circuit upheld the District Court's ruling in a divided opinion. Id. We have granted certiorari to address the meaning of the terms "use," "in relation to," and "without lawful authority," within the aggravated identity theft statute.

III. Standard of Review

The standard of review, in this case, is de novo.

IV. Analysis

A. The terms "use" and "in relation to" are too ambiguous to look solely to their plain meaning and so need to be interpreted with the help of further statutory construction canons.

We first look at the specific language of the statute. 18 U.S.C. § 1028A(a)(1) creates a mandatory two-year minimum sentence for anyone who "during and in relation to any [predicate felony violation], knowingly transfers, possesses or uses, without lawful authority, a means of identification of another person." The term "use" in the case here applies to the use of Patient L's name and Medicaid ID number. The parties agree that Patient L's identifying information meets the definition under 18 U.S.C. § 1028A(d)(7) of the "means of identification" of another person. Precisely how the "means of identification" is required to be *used* to fall within this statute's purview is what is at issue here.

Dubin contends that he did not "use" the identity "in relation to" the predicate felony. The term "use" is not defined in the statute and has many possible definitions; as our precedents have stated, the term "use" is so multifaceted as to require the reading of context to determine its meaning. See Bailey v. United States, 516 U.S. 137, 145 (1995) (discussing how the term use is driven by context); Smith v. United States, 508 U.S. 223, 245 (1993) (Scalia, J., dissenting) (stating that the term use is more sensitive than most to context).

Since we have found "use" is context-dependent, Dubin argues that the term "in relation to" is the key limitation of "use" here. The Government's position, however, is that "in relation to" means only to further the predicate offense in some way. U.S. Br. 21. The Government heavily relies on our holding in Smith for this definition, but we specifically stated there that "[w]e need not determine the precise contours of the 'in relation to' requirement here." Smith, 508 U.S. at 238. Other precedent found the term "in relation to" put a more restrictive interpretation upon the modified verb. See Muscarello v. United States, 524 U.S. 125, 138 (1998) (finding "in relation to" limits the verb "carry" to specific harms). From this, we gather that neither "use" nor "in relation to" has been so clearly defined in our precedent as to stop us from looking further.

The Government would argue then that the plainness of the language used in §1028A(a)(1) should stop our analysis at the terms themselves because we would be inserting elements that are not found in the statute, but "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the

language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole." Yates v. United States, 574 U.S. 528, 537 (2015) (plurality opinion) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). For example, in Yates, we found that a fish was not a tangible object for the purposes of the Sarbanes-Oxley Act. Yates, 574 U.S. at 528. A fish not being considered a tangible object is much more counterintuitive at first glance than what is at issue here, and so in accordance with our precedent, we will look beyond the terms to establish whether they are ambiguous or not.

What we find when reviewing the operative terms through this broader context is that they are not ambiguous when read as a whole and that they create a need for a nexus beyond that of an incidental relationship for the "use" of the identification and the predicate crime. The Government concedes that when the relationship between "use" and the predicate crime is inconsequential, § 1029A(a)(1) does not apply, which is a "but-for" causal standard. We go further than this, finding that a "but-for" cause between the name and the predicate offense is insufficient. To reach this conclusion, we must look at the broader context of the statute.

B. The overarching statutory scheme and title of § 1028A shapes our view that there must be an instrumental relationship between the "use" of the identity and the predicate crime.

Additional interpretative tools when a statute contains vagueness and doubt are appropriate here, such as using the statutory title and broader scheme

to illuminate a statute's meaning. See Yates v. United States, 574 U.S. 528, 552 (2015) (Alito, J., concurring) (looking to the title of a statute to interpret a doubtful term); Bailey v. United States, 516 U.S. 137, 145 (1995) (looking to the statutory scheme to determine the meaning of the term "use"). In fact, we looked at the title of § 1028A previously in Flores-Figueroa v. United States, 556 U.S. 646, 655 (2009), taking note of the word "theft" when construing the statute's meaning. The Government would have us ignore the title, as our precedent states it cannot override the plain meaning of the text, but as we have established above, the meaning of these terms is not clear, and when this is so we may use the title as statutory context to help. Compare Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879 (2021) (finding the Court cannot override the plain meaning of the text because of a statute's title), with Flores-Figueroa v. United States, 556 U.S. 646, 655 (2009) (using the title of § 1028A to help determine the statute's ambiguous meaning).

When we take the previous tools into consideration, again we come to a narrower conclusion than the Government's. A statute titled "Aggravated identity theft" does not comport with the broad conduct the Government would criminalize. Take the example of the waiter who overcharges for a bottle of wine on a credit card, who then runs a charge across state lines constituting wire fraud, a § 1028A(c) predicate crime. As the Government stated in its oral argument, this too would fall under their understanding of a violation of the statute. Oral Arg.

63–65. This conduct is a far cry from being conduct labeled aggravated identity theft.

The statutory scheme of § 1028A also does not make sense with the Government's interpretation. As we said above, to "use" this identification "in relation to" the predicate crime cannot be met sufficiently by only the completion of the predicate crime. Section 1028A is a sentence *enhancement* under the statutory scheme, requiring a mandatory two-year imprisonment to run consecutive to other sentences upon conviction. Sentence enhancements should require a higher level of culpability than merely the simple completion of a predicate crime, especially when there are a vast number of underlying crimes. As Dubin correctly pointed out, "we 'have traditionally exercised restraint in assessing the reach of a federal criminal statute.'" Marinello v. United States, 138 S.Ct. 1101, 1106 (2018) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)). In view of that principle, a narrower view of § 1028A(a)(1) is warranted.

One of the Government's defenses of this potential overreach of the statute does not hold up to scrutiny. Relying on our decision in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998), the Government contends that statutes often "go beyond the principal evil" for which they are intended. That is true, but the quote in that case goes on to say that is permissible for "comparable evils." Id. It cannot be said that it is a comparable evil between the waiter who steals a credit card and buys a new tablet, and the waiter who overbills for wine. These acts do not rise to the same level of culpability.

The same is true of Dubin who overbills Medicare but does not create a false claim from no real service rendered. This is a difference of categories, not degrees. Dubin is not lying about who is receiving the services, but rather the form in which those services were provided. It is no different than a butcher with his thumb on the scale. It is fraud, but it is not theft. It is the lie about who is receiving the services that the word "use," modified by "in relation to," is aiming to capture. Not how or when but *who*.[1] Made clearer to us by looking at the broader context of the statutory scheme and the title, the use of the identity itself must be wrong for it to meet the "used in relation to" requirement under § 1028A(a)(1).

C. "Without lawful authority" further limits the scope of § 1028A(a)(1) by only pertaining to instances where the identity of a person was used without their permission.

While our understanding of the term "use," in combination with "in relation to," puts the conduct of Dubin beyond the reach of § 1028A, the term "without lawful authority" also supports Dubin's contention that the aggravated identity theft statute does not apply here. The Government would give "without lawful authority" no meaning, as they state that one cannot give lawful authority

[1] See, United States v. Medlock, 792 F.3d 700 (2015) (finding under 18 U.S.C § 1028A that misidentifying how a patient was transported did not constitute "use" of their identification).

to break the law. This understanding would contradict our statutory construction principle that all the terms are presumed to be in the statute with purpose. See United States v. Taylor, 142 S. Ct. 2015, 2024 (2022) (stating that "we do not lightly assume Congress adopts two separate clauses in the same law to perform the same work"). This would violate that principle because if all that "without lawful authority" conveyed was that a predicate offense needs to occur (since one cannot give lawful authority to break the law), then it would render the term meaningless, as that is already in the statute.

In finding that the term "without lawful authority" must then presumptively carry meaning, we now again look to the terms and context of the statute to find its use. As we stated above, that "use" and "in relation to" language goes to the who and not the how of the predicate offence, it follows that "without lawful authority" would go to the permission of the owner of the identification. This makes sense, for example, when there is a scheme between two people to perpetuate a fraud. Imagine if Patient L was receiving a kickback from overbilling of Medicare, and that it was for fictitious services. It would meet our nexus test of falsifying *who* is receiving the benefits, but it still does not look like aggravated identity theft. Why should only the provider be exposed to this two-year charge when both are perpetuating a fraud with the patient's name? This is where "without lawful authority" adds to the statute's drive at identity theft in particular. It would bar the above example from using § 1028A(a)(1) because the identity was used with that person's permission.

We find Dubin's argument of a parallel between this definition of "without lawful authorization" and that of burglary convincing. It is already illegal to steal but to do so while unauthorized to be on the premises constitutes burglary. It is already illegal to defraud Medicare in a reimbursement claim, which requires a name, but to do so when that name is also unauthorized to be on the reimbursement claim is what we find constitutes "without lawful authority" under § 1028A. Here, because Dubin placed the identifying information of Patient L on the form with his or her permission, then it was not done "without lawful authority."

D. Constitutional avoidance and the rule of lenity are not appropriate here because there is no ambiguity to be resolved, however, the impact on federalism further sheds light on the likely inaccuracy of the Government's broad view of 1028A(a)(1).

We do not need to reach the rules of lenity and constitutional avoidance here because the answer to the ambiguities of the statute has been clearly found, but "[t]he fallout underscores the implausibility of the Government's interpretation." See Van Buren v. United States, 141 S.Ct. 1648, 1661 (2021) (finding that the term "exceeds authorized use" needed context but was not so vague as to require these canons). If we were to give such a broad reading to this language as the Government suggests, there would be cascading effects between the nature of state and federal law.

When a statute has ambiguities, it is appropriate to consult basic principles of federalism. Bond v. United States, 572 U.S. 844 (2014). If the expansive view of this statute was to be found, whole swaths of what are now state crimes would be jumped up to federal crimes. This is due to 18 U.S.C. § 1028(a)(7), a neighboring statute that uses the same operative language as § 1028A, except that it includes all state and federal felonies as a predicate crime. Where two similar statutes use the same language, we would presumably give that language the same effect. United States v. Davis, 139 S. Ct. 2319, 2329 (2019). If the Government's view of the terms of 18 U.S.C. § 1028A were imputed into 18 U.S.C. § 1028, as they must be if we were to endorse their view in this case today, then, for example, when an individual graffities another individual's name onto a wall, if it rises to the level of a state felony, that act would be a federal criminal offense.

This would be a large change to our understanding of federal and state power, and Congress must be explicit to drastically upset the balance of power between the federal government and the states. Cleveland v. United States, 531 U.S. 12, 25 (2000). Congress did not explicitly upset this balance in either §§ 1028 or 1028A. Interests of comity and federalism must weigh heavily then against giving the terms in 18 U.S.C. § 1028A(a)(1) broad meaning when it would result in such sweeping federal overtures into state policing power. This cements our view that the Government's broad interpretation of the terms of § 1028A(a)(1) is incorrect and that the narrower holding we make today regarding these terms reflects a more consistent position within our jurisprudence.

V. Conclusion

For the foregoing reasons, we reverse Dubin's conviction of aggravated identity theft.

Applicant Details

First Name	**Zachary**
Middle Initial	**C**
Last Name	**Semple**
Citizenship Status	**U. S. Citizen**
Email Address	**zs258@georgetown.edu**
Address	**Address** Street **130 M Street Apt. #808** City **zs258** State/Territory **District of Columbia** Zip **20002** Country **United States**
Contact Phone Number	**19784603916**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**The Beaudry Moot Court Competition** **Evans Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

DeLaurentis, Frances
frances.delaurentis@law.georgetown.edu
Bove, Marcia
bove.marcia@dol.gov
(202) 693-5598
Gottesman, Michael
gottesma@law.georgetown.edu
202-662-9482

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ZACHARY SEMPLE

130 M St. NE Washington, DC 20002 | (978) 460-3916 | zs258@georgetown.edu

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at Georgetown University Law Center and a member of Georgetown Journal of Legal Ethics. I am writing to apply for a 2024 clerkship in your chambers. I am particularly interested in clerking for you given your work for the Department of Justice in the Eastern District of Virginia.

I will use the skills I gain from a clerkship within your chambers to pursue a public service career. Throughout my professional life I have remained steadfast in my plan to use the law to create a more equitable society. I chose to spend this summer working for the Department of Justice's (DoJ) Summer Legal Intern Program (SLIP) rather than for a law firm because I know I have a responsibility to use the legal education I have received to help others. After completing a clerkship, I similarly plan to apply to both the DoJ Honors Program and Department of Labor (DoL) Honors Program.

Furthermore, throughout my legal education, I have sought out challenging courses and internships to improve my legal skills. I completed courses in administrative law and complex litigation to prepare to face the complicated procedural questions I will encounter during my legal career. Additionally, next semester I will complete Federal Courts to ensure I develop a robust understanding of the jurisdictional issues the federal judiciary faces. Likewise, recognizing the importance of strong legal research and writing skills, I have secured substantive writing opportunities for every semester of my education. During the fall and spring semesters of my second year I participated in writing-intensive internships. I will enroll in an upper-level writing course for the first semester of my third year. I will also participate in the Appellate Courts Immersion Clinic during the second semester of my third year. There, I will work full-time for the clinic writing briefs filed in Federal Circuit courts across the country. Through these experiences, I have leveraged every opportunity available in law school to affect radical improvements to my legal skills.

I have enclosed my resume, law school transcript, and a writing sample. MY letters of recommendation from Professor Michael Gottesman, Professor Frances DeLaurentis, and Senior DoL Trial Attorney Marcia Bove. are also enclosed. If you have any questions, I can be reached at zs258@georgetown.edu, or at 978-460-3916. Thank you for reviewing my application.

Best,
Zach Semple

ZACHARY SEMPLE
130 M St. NE Apt 808, Washington, DC 20002 • (978) 460-3916 • zs258@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Juris Doctor | GPA: 3.88 (Top 10% of class) Expected May 2024
Activities: Public Interest Fellow, Barristers' Council Appellate Advocacy Division,
Georgetown Journal of Legal Ethics, Appellate Courts Immersion Clinic (Spring 2024)
Awards and Honors: Beaudry Competition "Best Brief," Dean's List, Evans Moot Court Competition Quarterfinalist

GEORGE WASHINGTON UNIVERSITY **Washington, DC**
Bachelor of Arts, *cum laude*, in International Affairs May 2018
Honors: University Honors Program
Activities: Ultimate Frisbee Team, Delta Tau Delta, Residence Hall Association
Thesis: *Subnational Corruption and its Impact on the Informal Sector of Mexico*

EXPERIENCE

DEPARTMENT OF JUSTICE, CIVIL DIVISION, COMMERCIAL LITIGATION BRANCH **Washington, DC**
Summer Legal Intern Program May 2023 – July 2023
- Participated in mooting various motions hearings
- Completed memorandum on a wide variety of issues including administrative law, civil procedure, and the intersection of cryptocurrency property rights and bankruptcy law

DEPARTMENT OF JUSTICE, CIVIL DIVISION, CONSUMER PROTECTION BRANCH **Washington, DC**
Volunteer Intern Jan. 2023 – May 2023
- Reviewed thousands of documents to support case team's criminal prosecution of fraud
- Researched complex legal issues such as criminal venue laws and the Alternative Fines Act

CHAMBERS OF THE HONORABLE DISTRICT JUDGE COLLEEN KOLLAR-KOTELLY **Washington, DC**
Judicial Intern, United States District Court, District of Columbia Aug. 2022 – Dec. 2022
- Completed legal memorandum on various topics including criminal contempt, labor law, employment law, contract law, and constitutional law

DEPARTMENT OF LABOR, OFFICE OF THE SOLICITOR **Washington, DC**
Student Volunteer Intern, Plan Benefits Security Division (PBSD) May 2022 – Aug. 2022
- Received the Gary S. Tell ERISA Litigation Scholarship
- Conducted research and generated memorandum on ERISA, parity law, and common interest agreements
- Reviewed complex insurance documents to investigate compliance with the Mental Health Parity and Addiction Equity Act of 2008

THE AMERICAN SOCIETY OF ADDICTION MEDICINE (ASAM) **Rockville, MD**
Coordinator, Specialist, Manager of State Advocacy and Government Relations Feb. 2019 – Aug. 2021
- Promoted from Coordinator to Specialist to Manager in less than two years
- Authored comment letters, media pieces, testimony, and legislation to advance ASAM's advocacy priorities
- Supported ASAM's regulatory advocacy, including its response to the 2020 Medicare Physician Fee Schedule

THE MISSOURI DEMOCRATIC PARTY COORDINATED CAMPAIGN **Independence, MO**
Field Organizer May 2018 – Nov. 2018
- Led a field office that broke the record for attempted voter contacts in Independence, Missouri

SKILLS

Technical: PACER, Microsoft Office Suite, Relativity, WestLaw, Lexis
Soft Skills: Active listening, communication, fastidiousness, legal research and writing, time management

INTERESTS

Hobbies: Reading, exploring D.C., playing boardgames, walking with my dog

Record of: Zachary Semple
GUID: 832787715

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	95	Civil Procedure David Vladeck	4.00	B+	13.32	
LAWJ	002	51	Contracts Michael Diamond	4.00	A	16.00	
LAWJ	003	51	Criminal Justice Michael Gottesman	4.00	A	16.00	
LAWJ	005	50	Legal Practice: Writing and Analysis Frances DeLaurentis	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	45.32	3.78
Cumulative	12.00	12.00	45.32	3.78

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	004	95	Constitutional Law I: The Federal System Paul Smith	3.00	A-	11.01	
LAWJ	005	50	Legal Practice: Writing and Analysis Frances DeLaurentis	4.00	A-	14.68	
LAWJ	007	95	Property John Byrne	4.00	A	16.00	
LAWJ	008	95	Torts Kevin Tobia	4.00	A-	14.68	
LAWJ	025	50	Administrative Law Eloise Pasachoff	3.00	A	12.00	
LAWJ	611	13	Questioning Witnesses In and Out of Court Michael Williams	1.00	P	0.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	68.37	3.80
Annual	31.00	30.00	113.69	3.79
Cumulative	31.00	30.00	113.69	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1098	05	Complex Litigation Maria Glover	4.00	A	16.00	
LAWJ	1491	07	Externship I Seminar (J.D. Externship Program) Deborah Carroll		NG		
LAWJ	1491	131	~Seminar Deborah Carroll	1.00	A-	3.67	
LAWJ	1491	133	~Fieldwork 3cr Deborah Carroll	3.00	P	0.00	
LAWJ	165	05	Evidence Michael Gottesman	4.00	A+	17.32	
LAWJ	263	09	Employment Law Brishen Rogers	3.00	A	12.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	15.00	12.00	48.99	4.08
Cumulative	46.00	42.00	162.68	3.87

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1492	14	Externship II Seminar (J.D. Externship Program)		NG		
LAWJ	1492	83	~Seminar	1.00	A-	3.67	
LAWJ	1492	85	~Fieldwork 3cr	3.00	P	0.00	
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00	
LAWJ	351	08	Trial Practice	2.00	A-	7.34	
LAWJ	361	08	Professional Responsibility	2.00	A	8.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	12.00	9.00	35.01	3.89
Annual	27.00	21.00	84.00	4.00
Cumulative	58.00	51.00	197.69	3.88

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend enthusiastically Mr. Zachary Semple for a judicial clerkship with your chambers. Mr. Semple was as student in my year-long required Legal Practice: Writing and Analysis course during the 2021-22 academic year. As such, I had the privilege of working closely with him in my intensive writing class, meeting with him several times, and reviewing his writing on numerous occasions. This academic year, I have had the opportunity to meet with Mr. Semple a few times to discuss his academic progress and career plans. Each time I meet with Mr. Semple, I am struck by his intense engagement with the law, his keen intellect, and his strong work ethic. As described more fully below, Mr. Semple would be a welcome addition and asset to your chambers.

Mr. Semple has impressed me as an intellectually curious young man who constantly seeks to learn, improve and hone his craft. He is someone who seems to really love the law; he loves reading about the law, thinking about the law, and engaging with legal questions of great import. At the same time, he recognizes the role that law plays in society and in the daily lives of citizens. Thus, his engagement with the law is not purely intellectual; he is willing to grapple with the real life consequences of legal decisions.

As with many first-year students, the transition from academic prose and policy writing to the more analytical, concise style of legal writing was initially challenging for Mr. Semple. He also struggled initially to confine himself to the precise legal question posed rather than analyzing every tangential issue raised by a fact pattern. His very detailed focus often caused him to notice small nuances in fact patterns that were unintentional but led to vastly different outcomes. In his excitement, he had a tendency to overthink and unduly complicate issues. As the semester progressed, he continued to ask insightful questions but respected set boundaries and answers. As he learned to harness his enthusiasm, he also devoted himself to improving his writing by seeking feedback and writing numerous drafts. During the fall semester of the Legal Practice course, students are required to conduct extensive research and draft at least two predictive office memoranda. In the spring semester, students write a draft and revised appellate brief on two issues of constitutional law. At the end of each semester, students complete a take-home examination that requires them to conduct independent research and draft a predictive memo in the fall, and a persuasive brief in the spring. Mr. Semple's basic writing skills were strong from the outset; likewise, he had strong research skills. His ability to set forth a detailed analytical paradigm grounded in the law and incorporating legal reasoning developed over the course of the year as he took advantage of all of the writing opportunities to improve his analysis and legal writing. In the spring, he embraced the switch to persuasive writing. He earned a grade of A- in my class. Perhaps even more reflective of his strong persuasive writing is the fact that his brief in the first year moot court Beaudry Competition was honored as the Best Brief. Mr. Semple's strong performance in my class is not an aberration as evident from his high G.P.A. of 3.87.

Given his love for the law, Mr. Semple has embraced law school and the opportunities it offers. He is a member of the *Georgetown Journal of Legal Ethics*, a member of the Barristers' Council Appellate Advocacy Division, and was a quarterfinalist in the Evan Moot Court Competition. Mr. Semple is also a Public Interest Fellow. Next year, he will serve as a student attorney in Georgetown's Appellate Courts Immersion Clinic. Whether in class, an extracurricular activity, or at an internship, Mr. Semple is always thinking about the law. By way of example, he recently stopped by my office to tell me of an interesting project he had at his current internship with the Department of Justice and explain why he thought the legal question posed in his current project would make an interesting assignment for my 1L students. Unlike other students who, at most, would mention the project, Mr. Semple arrived with materials to help educate me. Cognizant of his ethical duties, he did not share with me the memo he created for his supervising attorney at the DOJ. Instead, he created a memo that addressed the legal issue only, including the relevant statute and key cases.

As a student, Mr. Semple demonstrated that he is incredibly hard-working and bright; he sees the big picture without losing sight of the smallest of details, and he has a firm grasp of the legal issues presented by the various assignments. He has shown strong analytical and research skills, as well as an understanding of both the legal writing process and the elements that distinguish great legal writing from mediocre writing. His work product has been consistently strong, his contributions to class discussions were insightful and thoughtful; and his numerous interactions with me were engaging and professional. When he came to my office hours, he was always prepared with questions and an open mind.

Moreover, Mr. Semple views the law as a tool to help others. As evident from his resume, Mr. Semple is someone who is committed to public service and intends to pursue a career in public service. He has been so steadfast in his commitment to public service that he chose not to participate in the On Campus Interview program for law firms. Instead, he has sought opportunities to hone his legal skills through public service. He gained valuable experience this past fall as a judicial intern for the Honorable United States District Court Judge Collen Kollar-Kotelly, District of Columbia, and as a summer intern with the Office of the Solicitor at the U.S. Department of Labor. This spring semester he is interning with the U.S. Department of Justice, Civil

Division, Consumer Protection Branch. This coming summer, he will participate in the Department of Justice's Summer Legal Intern Program, working in the Civil Division, Commercial Litigation Branch. Long term, he is particularly interested in government service that will help advance the rights of workers while pushing back on the accumulation of power by corporations.

Equally as important, Mr. Semple is a thoughtful, caring and genuine person. He works well independently as well as collaboratively, always seeking to be inclusive. He treats all he encounters with dignity and kindness. He has an upbeat personality and generally wears a smile on his face. He is someone who would enhance and brighten any workplace.
I obviously have a high opinion of Mr. Semple and recommend him for a clerkship position. Please do not hesitate to contact me if I can be of any further assistance to you in this process.

Sincerely,

Frances C. DeLaurentis
Professor of Law, Legal Practice

U.S. Department of Labor

Office of the Solicitor
Washington, DC 20210

April 20, 2023

Dear Judge,

I am writing this letter to support Zachary Semple's judicial clerkship application. Mr. Semple worked as a law clerk in our office, the Plan Benefits Security Division ("PBSD"), Office of the Solicitor, U.S. Department of Labor, during the summer of 2022. PBSD prosecutes claims arising under the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 ("ERISA").

Mr. Semple is intelligent, capable, and conscientious. He worked quickly and was extremely productive. I was able to assign complex issues to him that I generally would not have assigned to a law student. His written work was consistently well organized, thorough, and accurate. Mr. Semple is self-directed, flexible, and professional. This was evident in his ability and willingness to tackle factually and legally complex projects with optimism and tolerance for the divergent approaches of other team members. All of the attorneys with whom he worked were impressed by his competence and ability to contribute to the cohesiveness and quality of a team's overall product.

Mr. Semple worked closely with me on a complex investigation being developed by multiple regional offices. I asked him, and other team members, to review subpoenaed data and prepare draft deposition questions based upon that material. He quickly and accurately analyzed voluminous material and prepared questions that, in coordination with other team members, comprehensively addressed the relevant issues.

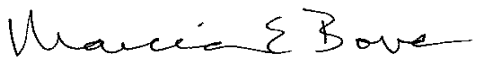
Mr. Semple had significant professional experience before attending law school that enhanced his ability to organize, participate in, and accurately address complex communications during meetings and other interactions involving multiple parties. He is a quick and accurate auditory learner. We relied upon him to organize and lead a significant meeting with public and private healthcare stakeholders. He identified topics and drafted questions. His nuanced questions demonstrated that he understood the Department's goals for the meeting as well as the stakeholders' viewpoints. In a post-meeting discussion, he creatively identified numerous potential legal strategies to address stakeholder comments and concerns.

Among other assignments, Mr. Semple reviewed precedent in all state and federal court jurisdictions to analyze treatment of medical necessity guidelines in individual Mental Health Parity and Addiction Equity Act ("MHPAEA") cases. He drafted a well-written, thorough, and concise memorandum that synthesized precedent in each jurisdiction to identify variation in how these jurisdictions analyzed MHPAEA claims. Nearly a year later, the Department continues to rely on his analysis.

Mr. Semple made a significant contribution to the work of our office. He was professional, efficient, and courteous at all times. We were fortunate to have him at a time when his prior experience with state and federal healthcare and insurance regulations was particularly important to our work.

Although I have not found a consistent correlation between a high cumulative GPA and the ability to perform a broad range of legal tasks, Mr. Semple's high GPA is indicative of all an employer could reasonably expect. Please contact me or Melissa Moore, Counsel for Health Investigations and Compliance, at (202) 693-5282 or Moore.Melissa@dol.gov, if we can provide any additional information.

Very truly yours,



Marcia E. Bove
Senior Trial Attorney
Plan Benefits Security Division
(202) 693-5598
bove.marcia@dol.gov

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Zachary Semple is one of the most impressive students I've taught in the past two years. He will make a superb judicial law clerk.

Zach was a student in two of my courses: Criminal Justice in his first year (a course that covers the constitutional principles governing interaction between citizens and law enforcement – the Fourth and Fifth Amendments), and Evidence in his second year. He was a star in both classes.

Zach was a frequent contributor to class discussion in both courses. He demonstrated a complete command of the materials and an exceptional ability to spot the factual nuances that matter in resolving each legal issue (as well as clarity in explaining why those nuances matter.)

These attributes carried over to Zach's exams in both courses. His exams were beautifully organized and written, and again spotted every nuance that would bear upon the resolution of each issue. His exam in Criminal Justice was the second-best of the 36 in the class, and missed by a tiny fraction scoring the one A+ we're allowed to give. His Evidence exam indeed was the best of the 123 in that class, and this time he did receive the A+. Many of the top students in the Classes of 2023 and 2024 were in this class, and Zach outscored them all.

Zach is an energetic student with a genuine interest in how the law develops. He was a frequent visitor during office hours, not to clarify his understanding of what we had covered (he didn't need clarification), but rather to explore issues that spun off those we studied. I enjoyed these interactions and learned much from our exchanges.

Zach has an engaging personality. He is fun to talk to, has a good sense of humor, and is enthusiastic about all aspects of the law. He would be a delight to work with for all in chambers.

Zach is determined to pursue a career of public service. His primary interest is in protecting and advancing the rights of workers. He hopes to work either in the Department of Justice or the Department of Labor to pursue these goals. His commitment is so strong that he passed up the opportunity to interview private law firms in our OCI week, and participated instead only in the week devoted to interviews with government agencies.

In sum, I think Zach possesses all the attributes that would make him an invaluable judicial law clerk.

Sincerely,

Michael Gottesman
Reynolds Family Endowed Service Professor

Michael Gottesman - gottesma@law.georgetown.edu - 202-662-9482

From: Zachary Semple, Legal Intern
To: Marcia Bove, Senior Trial Attorney
Date: August 1, 2022
Subject: Knowing Participation Liability Under ERISA

Questions Presented

I. How willing are courts to accept circumstantial evidence to establish a defendant had actual or constructive knowledge of a fiduciary breach in the context of a knowing participation claim?
II. When have courts assigned constructive knowledge to defendants in knowing participation cases?
III. What knowledge must a defendant possess to be liable as a knowing participant in a fiduciary breach?
IV. What remedies are available against a knowing participant?

Brief Answer

I. Circuit and district courts have accepted circumstantial evidence to establish a knowing participant's knowledge in a variety of situations. The few district court opinions that have viewed circumstantial evidence as insufficient have likely done so because of the facts of those specific cases, as opposed to an aversion towards circumstantial evidence generally.
II. Courts rarely assign constructive knowledge to defendants in knowing participation cases. In one case the court found a corporation had constructive knowledge of the circumstances that rendered the transaction unlawful where the corporation's owners admitted to having knowledge of the circumstances. Otherwise, courts have either left questions of constructive knowledge to be determined during a bench trial or ruled that the defendant possessed "actual or constructive knowledge" without clarifying as to whether the knowledge was "actual" or "constructive."
III. Courts are split on whether a knowing participant must merely possess information related to the underlying circumstances of the fiduciary breach, whether the knowing participant must be aware that the action taken in fact amounts to a fiduciary breach, or whether the knowing participant must be aware the action taken violated ERISA.
IV. All remedies traditionally available in equity may be pursued by plaintiffs against a knowing participant. There remains disagreement among the circuit and district courts as to whether tracing requirements attach to claims seeking restitution and disgorgement against knowing participants.

Background

In its decision in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, the Supreme Court ruled a plan participant, beneficiary, or fiduciary can bring an action under the Employee Retirement Income Security Act (ERISA) of 1974, § 502(a)(3), 29 U.S.C. 1132(a)(1) against a party for knowingly participating in a prohibited transaction as defined by ERISA §

406(a), 29 U.S.C. § 1106 even if they themselves are not fiduciaries to the plan. *Harris Trust and Savings Bank v. Salomon Smith Barney*, 530 U.S. 238, 251 (2000). The Secretary of the Department of Labor can bring the same claim under ERISA § 502(a)(5), 29 U.S.C. 1132(a)(2). *Harris Trust* further ruled that the nonfiduciary must have "actual or constructive knowledge of the circumstances that render the transaction unlawful" for knowing participation liability to attach. *Harris Trust*, 530 U.S. at 251. *Harris Trust* reversed dictum from a previous decision, *Mertens v. Hewitt Associates*, stating that ERISA does not create a cause of action against a nonfiduciary for knowing participation in a fiduciary breach. 508 U.S. 248, 253-54 (1993). While defendants accused of knowing participation continue to cite *Mertens* for the proposition that ERISA does not establish liability against parties that are not fiduciaries for knowing participation in breach of a fiduciary duty, this reliance appears misplaced, as circuit courts almost universally have recognized a cause of action for knowing participation in a breach of fiduciary duty in the wake of *Harris Trust*'s recognition of knowing participating liability for prohibited transactions. *See, e.g.*, *Martinez v. Sun Life Assurance Company of Canada*, 948 F.3d 62, 72 n.9 (1st Cir. 2020). However, significant confusion remains regarding four critical issues: (1) how willing are courts to accept circumstantial evidence to establish a defendant had actual or constructive knowledge of a fiduciary breach; (2) when have courts assigned constructive knowledge to knowing participants; (3) what knowledge must a defendant possess to be liable for participation in a fiduciary breach; (4) what remedies are available against a knowing participant?

Discussion

I. How willing are courts to accept circumstantial evidence to establish a defendant had actual or constructive knowledge of a fiduciary breach?

Since *Harris Trust*, courts have shown a general willingness to admit circumstantial evidence to prove a defendant's actual or constructive knowledge for purposes of § 502(a) liability. Actual knowledge may be inferred from circumstantial evidence. *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768, 779 (2020). However, the discussion of circumstantial evidence in *Sulyma* related to actual knowledge in the context of the statute of limitations under ERISA § 413, 29 U.S.C.A. § 1113, not knowing participation liability. Furthermore, it did not specifically address the use of circumstantial evidence to prove constructive knowledge. Within the knowing participation context, at least two circuits and one district court have considered circumstantial evidence post-*Harris Trust*. *See Carlson v. Principal Financial Group*, 320 F.3d 301, 308 (2d Cir. 2003) (reversing lower court's dismissal of complaint and noting defendant's failure to mail a certificate required by 29 C.F.R. § 4041.28(d)(1) might support an inference of constructive knowledge of fiduciary breach); *Walsh v. Vinoskey*, 19 F.4th 672, 675-76 (4th Cir. 2021) (granting summary judgement based on four indicia of circumstantial evidence establishing that defendant had actual knowledge stock was overvalued); *Acosta v. Saakvitne*, 355 F. Supp. 3d 908, 924-25 (D. Haw. 2019) (recognizing as sufficient to defeat a motion to dismiss allegations that defendants were aware of company's erroneous stock valuation but attempted to sell stock at unrealistically high price regardless). Further, at least one circuit used circumstantial evidence to prove a defendant's knowing participation in a fiduciary breach prior

to the Supreme Court recognizing knowing participation liability in *Harris Trust*. *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (finding a non-fiduciary's knowledge of a fiduciary's breach may be inferred from circumstances raising a reasonable inference of knowledge). Since *Harris Trust*, the Eastern District of Tennessee has recognized *Brock* as good law. *Chao v. Johnston*, No. 1:06-CV-226, 1:06-CV-227, 2007 WL 2847548 at *6 (E.D. Tenn. July 9, 2007) (noting plaintiffs raised sufficient circumstantial evidence at the pleading stage to support an inference of knowing participation and defeat a motion to dismiss).

In perhaps the most exhaustive analysis of circumstantial evidence in a knowing participation case, the Fourth Circuit in *Vinoskey* upheld the district court's summary judgement grant to plaintiffs based on four facts that, in the court's view, supported a reasonable inference that a CEO knowingly participated in a prohibited transaction because he knew the stock price was inflated. *Id.* at 678. First, the CEO reviewed the appraisal behind the inflated share price and the company's financials before accepting the stock offer in the challenged transaction. *Id.* Second, he knew the share price had recently been almost 75% lower than the proposed share price the Employee Stock Ownership Plan (ESOP) would pay. *Id.* Third, the CEO had regularly reviewed the company's financials. *Id.* Fourth, the CEO knew selling his shares to the ESOP would not cause him to lose all control of the company. *Id.* Relying on these facts, the Fourth Circuit affirmed the district court's summary judgment against defendant for his knowing participation in a prohibited transaction. *Id.*

In contrast, other district courts have ruled against plaintiffs whose cases were largely reliant on circumstantial evidence, although these outcomes are likely not indicative of a broader aversion to the use of circumstantial evidence in knowing participation cases. *See, e.g.*, *Eslava v. Gulf Telephone Company*, No. 04-0297-KD-B, 2007 WL 9717348 at *4 (S.D. Ala. June 13, 2007) (ruling circumstantial evidence of appraiser's conflict of interest insufficient to defeat defendant's motion for summary judgement where circumstantial evidence indicated appraiser employed by ESOP to determine value of stock had previously worked for owner of the stock); *Scalia v. Reliance Trust Co.*, No. 17-cv-4540, 2021 WL 795270 at *37 (D. Minn. Mar. 2, 2021) (noting that analysis of whether defendants were knowing participants in a prohibited transaction was a "fact intensive inquiry" that precluded granting of summary judgement based on circumstantial evidence). Critically, no courts have categorically repudiated the use of circumstantial evidence to establish a defendant's knowing participation at the summary judgement stage.

Finally, district courts in the Eighth Circuit have reached opposite conclusions. *Compare Perez v. Mueller*, No. 13–C–1302, 2014 WL 2050606 at *3 (E.D. Wis. May 19, 2014) (indicating court's willingness to infer facts sufficient to defeat a motion to dismiss from a threadbare recitation of the elements of a cause of action in a complaint against a knowing participant where the alleged knowing participants owned the trust into which money made from a breach of fiduciary duty was funneled), *with Wilson v. Pye*, No. 85 C 6341, 1988 WL 1404, at *2 (N.D. Ill. Jan. 6, 1988) (ruling mere allegation that defendant bank permitted plan trustee to defulcate funds from Plan account insufficient to defeat motion to dismiss). These differing

rulings are likely caused by the fact-specific nature of each claim, and the comparative strength of each pleading.

II. When have courts assigned constructive knowledge sufficient to establish knowing participation liability?

Courts have assigned constructive knowledge to defendants in knowing participation cases; however they have done so only infrequently. *Harris Trust* established constructive knowledge as sufficient to implicate knowing participation liability. 530 U.S. at 250. Constructive knowledge is knowledge that a person using reasonable care or diligence should have, and is therefore attributed by law to the person. *Constructive Knowledge, Black's Law Dictionary* (9th ed. 2009). Generally, courts will find that defendants had "actual or constructive knowledge" when ruling on knowing participation liability without explicitly assigning constructive knowledge to a defendant. However, a few courts have specifically addressed the issue. The Second Circuit noted a nonfiduciary might have constructive knowledge sufficient to impose knowing participation liability where the nonfiduciary allegedly failed to send a certificate outlining its obligations to a beneficiary, as required by 29 C.F.R. § 4041.28(d)(1). *Carlson v. Principal Financial Group*, 320 F.3d 301, 308 (2d Cir. 2003). Another court permitted the question of constructive knowledge to reach the bench trial stage. *Iron Workers Local No. 60 Annuity Pension Fund by Robb v. Solvay Iron Works, Inc.*, No. 5:15-cv-54 (BKS/DEP), 2018 WL 2185510 at *13 (N.D.N.Y. May 11, 2018). In *Iron Workers Local No. 60*, a board member was alleged to have received monthly updates during board meetings that included information on the circumstances that rendered a transaction between the board member and a plan unlawful. *Id.* The court concluded that if the information had in fact been presented during those meetings, the defendant had at least constructive knowledge sufficient to implicate knowing participation liability. *Id.* In another instance, the Northern District of New York held a corporation had constructive knowledge of the circumstances that rendered the transaction unlawful where both of the corporation's owners admitted to knowledge of the circumstances.[1] *Mintjal v. Professional Benefit Trust*, 146 F. Supp. 3d 981, 997 (N.D. Ill. 2015). Besides the decision in *Mintjal*, no court has ruled a defendant had constructive knowledge alone, instead ruling ambiguously that defendants had "actual or constructive knowledge." Courts may be hesitant to impose constructive knowledge upon knowing participants because unlike fiduciaries, nonfiduciary knowing participants do not have any duties explicitly imposed upon them by ERISA.

III. What knowledge must a knowing participant possess?

The district and circuit courts have adopted three different approaches to the level of knowledge a knowing participating must possess to satisfy the knowledge requirement of a knowing participation claim. Some courts rule that the defendants merely must be aware of the factual circumstances underlying a transaction, but not the legal significance of those

[1] Here, the court appears to have conflated the doctrine of constructive knowledge with the doctrine of collective knowledge, which holds that "collective knowledge of all employees and agents within (and acting on behalf of) the corporation," may be imputed to the corporation itself. *United States v. Philip Morris U.S.A., Inc.*, 449 F. Supp. 2d 1, 1575 (D.D.C. 2006). Collective knowledge likely is another tool available for plaintiffs to establish knowing participation of a corporation.

circumstances. *Haley v. Teachers Ins. and Annuity Assoc. of America*, 377 F. Supp. 3d 250, 260 (S.D.N.Y. 2019); *see Neil v. Zell*, 753 F. Supp. 2d 724, 731 (N.D. Ill. 2010) (interpreting *Harris Trust* to mean that fiduciary and non-fiduciary defendants need only "actual or constructive knowledge of the deal's details"); *Vinoskey*, 19 F.4th 672, 677 (4th Cir. 2021) (knowing participant need not know the transaction is unlawful but must have more than general knowledge of the transaction's circumstances). In the context of knowing participation in a prohibited transaction under § 406(a), the Southern District of New York provided six elements a plaintiff must plead to survive a motion to dismiss a knowing participation claim: 1) the fiduciary caused the plan to engage in a prohibited transaction as defined by § 406; 2) based on the factual circumstances of the transaction, a § 408 exemption did not clearly apply; 3) in causing the transaction, the fiduciary knew or should have known the factual circumstances underlying the transaction that satisfied § 406; 4) the non-fiduciary knew that the transferor was an ERISA fiduciary; 5) the non-fiduciary knew that the fiduciary caused the transaction and had knowledge of the underlying facts that brought the transaction within § 406; and 6) the non-fiduciary knew or should have known the factual circumstances underlying the transaction that satisfied § 406. *Haley*, 377 F. Supp. 3d at 265-66. These elements as enunciated by *Haley* do not require knowledge of ERISA, or any legal conclusions. *Haley* concluded the plaintiff pled sufficient facts to defeat a motion to dismiss where it alleged the knowing participant knew it was transacting with an ERISA fiduciary, and that both the knowing participant and the fiduciary knew a loan program involved the indirect lending of money between the Plan and plan participants. *Id.* at 267.

However, other courts have imposed a higher burden of proof upon plaintiffs. Specifically, they have held the knowing participant must be aware the fiduciary's actions violated a fiduciary duty. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 282-83 (2d Cir. 1992); *see Trustees of Upstate New York Engineers Pension Fund v. Ivy Asset Management*, 131 F. Supp. 3d 103, 131 (S.D.N.Y. 2015); *L.I. Head Start Child Development Services v. Frank*, 165 F. Supp. 2d 367, 371 (E.D.N.Y. 2001) (quoting *Liss v. Smith*, 991 F. Supp. 278, 305 (S.D.N.Y.1998)). In *Ivy Asset Management*, the court outlined the two elements of knowing participation liability: (1) knowledge of the primary violator's status as a fiduciary; and (2) knowledge that the primary's conduct contravenes a fiduciary duty. 131 F. Supp. 3d at 131 (quoting *Gruby v. Brady*, 838 F. Supp. 820, 835 (S.D.N.Y. 1993)).

At least two district courts have applied an even more stringent standard, ruling the defendant must be aware the transaction they are participating in violates ERISA. *See Teets v. Great–West Life & Annuity Insurance Co.* 286 F. Supp. 3d 1192, 1208 (D. Colo. 2017); *Rozo v. Principal Life Insurance Co.*, 344 F. Supp. 3d 1025, 1037 (S.D. Iowa 2018). However, the circuit court in both *Teets* and *Rozo* did not specifically address this issue. Additionally, the Eastern District of Pennsylvania provided a more nebulous standard when it held the plaintiff must show defendant had actual or constructive knowledge that "some claim exists," which could include the opinions of experts, knowledge the transaction would be harmful, or actual harm. *Spear v. Fenkell*, No. 13-2391, 2016 WL 5661720 at *31 (E.D. Pa. Sept. 30, 2016) (quoting *Gluck v. Unisys Corp.*, 960 F.3d 1168, 1177 (3d Cir. 1992)). Given that *Gluck* concluded by noting in the ERISA

context, "some claim exists" means actual knowledge of a breach of fiduciary duty, *Spear* likely aligns with cases requiring knowledge the fiduciary's conduct violates a fiduciary duty.

In bringing a claim against a knowing participant, a plaintiff must be prepared to respond to language in *Harris Trust* that implies a higher standard of knowledge for knowing participants than fiduciaries. Specifically, while a fiduciary is liable for a prohibited transaction if they are aware of "facts satisfying the elements of a 29 U.S.C. § 1106(a) transaction," *Harris Trust* requires a knowing participant to have actual or constructive knowledge of "the circumstances that rendered the transaction unlawful." *Teets*, 286 F. Supp. 3d at 1208 (quoting *Harris Trust*, 530 U.S. at 251). *Teets* found compelling the argument that the Supreme Court's use in Harris Trust of different language than that of fiduciary liability points to a higher knowledge requirement for knowing participation than fiduciary liability. *Id.* Furthermore, *Harris Trust* warned against requiring a counterparty to transactions with a plan to monitor the plan for compliance with ERISA, indicating a hesitance to impose significant compliance requirements upon non-fiduciaries. *Harris Trust*, 530 U.S. at 252. However, at least one case brought by the Secretary of Labor appears to have fully rebutted the knowledge requirement as understood in *Teets*. *See Vinoskey*, 19 F.4th 677-78 (4th Cir. 2021). There, the Secretary emphasized 1) the plain language of *Harris Trust* requires only knowledge of the facts that render a transaction unlawful; 2) the *Harris Trust* opinion makes no mention of knowledge of the law as a necessary element of knowing participation liability; 3) had *Harris Trust* intended to impose such a requirement, it would have done so with clear language. Brief of Appellee at 44, *Vinoskey*, 19 F.4th at 677-78 (4th Cir. 2021).

IV. What remedies are available against a knowing participant?

Plaintiffs may seek equitable remedies against nonfiduciary knowing participants. The Supreme Court first limited the universe of possible remedies available against non-fiduciaries who participate in a fiduciary breach in *Mertens*. There, it held Congress intended to revive the distinction between legal and equitable remedies in ERISA § 502(a). *Mertens*, 508 U.S. at 254-55. It concluded that § 502(a)(5) permits plaintiffs to seek against knowing participants only remedies that were traditionally considered equitable as opposed to remedies traditionally considered legal, such as compensatory damages. *Id.* at 260. After *Mertens*, the Supreme Court further elaborated on the availability of equitable remedies against knowing participants in *Harris Trust*, when it noted that § 502(a)(3) authorizes "an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom." 530 U.S. at 250. The types of remedy available to plaintiffs against knowing participants are therefore more restricted than remedies available against fiduciaries. *Compare CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011) (holding a plaintiff may pursue as a remedy against a fiduciary monetary compensation for a loss resulting from the trustee's breach of duty) with *Mertens*, 508 U.S. at 255-56 (ruling plaintiffs could not seek "monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties" against a knowing participant).

While courts now almost universally permit equitable remedies for knowing participation claims, confusion remains as to whether tracing requirements attach to restitution and

disgorgement in the knowing participation context. A tracing requirement imposes upon plaintiffs a requirement that they identify a fund apart from the knowing participant's general assets that was received in connection with participation in the breach of fiduciary duty. *Great West Life & Annuity Ins. Co v. Knudson*, 534 U.S. 204, 213 (2002). Traditionally, tracing requirements have not attached to disgorgement where the party possessing the wrongfully obtained property is a "conscious wrongdoer." *Id.* at 214, (citing *Restatement of Restitution* § 215, Comment a (1937)). Conscious wrongdoing occurs "when a person interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights." *Restatement (Third) of Restitution* § 3 (2019). This conscious wrongdoer exception to tracing requirements may have implications for the level of knowledge a plaintiff alleges against a knowing participant. Specifically, if the plaintiff alleges merely that a knowing participant to a prohibited transaction had actual or constructive knowledge of the "deals details," as per *Zell*, then tracing requirements may attach, because the plaintiff might struggle to establish the knowing participant acted in "conscious disregard of the other's rights." *See generally, Zell*, 753 F. Supp. 2d at 731. However, if the plaintiff argues the defendant knew or should have known the fiduciary's actions violated ERISA, as in *Teets*, then tracing requirements should not attach, because the knowing participant was aware they participated in a violation of ERISA and therefore acted as a conscious wrongdoer. *See generally, Teets*, 286 F. Supp. 3d at 1208.

Unfortunately, the Tenth Circuit in *Teets v. Great-West Life & Annuity Ins. Co.* reached the opposite conclusion, attaching a tracing requirement to restitution, accounting and disgorgement, even though the district court required a showing that the defendant had actual or constructive knowledge that the fiduciary's action violated ERISA. 921 F.3d 1200, 1225 (10th Cir. 2019). The Ninth Circuit echoed this position when it ruled the plaintiff had failed to state a claim for equitable relief because the plaintiff could not identify a specific fund from which they sought recovery. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 664 (9th Cir. 2019). Alternatively, many district courts have acknowledged there is no tracing requirement for knowing participation claims. *See e.g. Spear v. Fenkell*, No. CV 13-2391, 2016 WL 5561720 at *33 (E.D. Pa. Sept. 30, 2016); *In re Beacon Associates Litig.*, 818 F. Supp. 2d 697, 708 (S.D.N.Y 2011). Until the Supreme Court provides more explicit guidance on the issue, courts may continue to reach conflicting rulings.

Additionally, the most recent ruling from the Supreme Court on equitable remedies may have ramifications for disgorgement as a remedy in the knowing participation context. In *Liu v. SEC*, the Court highlighted significant limiting principles for disgorgement. 140 S. Ct. 1936 (2020). Perhaps most crucially, the Court noted disgorgement is limited to the "net" profits, or the "gain made upon any business or investment, when both the receipts and payments are taken into the account." *Liu*, 140 S. Ct. at 1945. This focus on net profits requires courts to deduct "legitimate business expenses" incurred by the business from the disgorgement amount, although certain business expenses may be wholly fraudulent. *Id.* at 1950. While no courts have yet ruled on the applicability of this limiting principle to disgorgement in the ERISA context, *Liu* noted its guidance on disgorgement is broadly applicable to disgorgement as a remedy for other statutes. *Id.* at 1944. Perhaps in anticipation of the decision in *Liu*, Congress amended the Securities

Exchange Act of 1934 to enshrine disgorgement as an available remedy through passage of the National Defense Authorization Act for Fiscal Year 2021 (NDAA). National Defense Authorization Act for Fiscal Year 2021, § 15 U.S.C. 78u(d) (2020). However, this amendment does not reject the limiting principles enunciated in *Liu*. § 78u(d). Furthermore, the language of § 78u(d) outlining the specific penalties the Security Exchange Commission may impose does not affect the common law doctrine of disgorgement, so the statute has no effect on disgorgement as a remedy under ERISA. Therefore, *Liu* may provide knowing participation defendants a novel argument to limit disgorgement remedies under ERISA.

Applicant Details

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Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Foundation**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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The Honorable Jamar K. Walker
Walter East Hoffman United States Courthouse
600 Granby Street
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June 12, 2023

Dear Judge Walker,

I am a rising third-year student at Georgetown Law pursuing a career as a trial litigator focused on labor and employment law. My strong record of public service and legal writing experience would enable me to contribute meaningfully to your chambers as a clerk.

For four years before law school, I wrote public comments on regulations, developed expertise on several federal public benefit programs, and crafted legislation with members of Congress while working at an anti-poverty nonprofit organization.

At Georgetown, I have continued to seek out opportunities to serve the public. As a member of the Black Law Students Association, I have volunteered to help D.C. residents access housing assistance. I have presented at a public interest conference at Morehouse College and worked for three federal agencies. Most recently, I represented indigent clients in housing discrimination and family law cases as a student attorney in Georgetown's Health Justice Alliance Clinic.

I have also honed my legal writing and research skills. This spring, I published an article in the *Georgetown Journal on Poverty Law and Policy*. As an Executive Articles Editor for the *Georgetown Law Journal*, I lead a team in providing above-the-line feedback on academic articles prior to publication.

I am particularly interested in clerking in your chambers because of your experience as an Assistant United States Attorney and your recent appointment to the bench. It would be a distinct honor to serve as one of your clerks at the beginning of your time on the bench.

I hope to apply the legal research, writing, and analysis skills that I have developed and to continue serving the public as a clerk in your chambers. Thank you for your consideration.

Shiva Michael Sethi
Candidate for Juris Doctor 2024

SHIVA MICHAEL SETHI

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EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Juris Doctor Expected May 2024
GPA: 3.67
Journal: *The Georgetown Law Journal* (Executive Articles Editor)
Clinic: Health Justice Alliance
Activities: Black Law Students Association, South Asian Law Students Association, RISE Fellow, Public Interest Fellow, American Constitution Society.

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL **Chapel Hill, NC**
Bachelor of Arts in Economics and Global Studies (Double major) May 2017

EXPERIENCE

BREDHOFF & KAISER **Washington, DC**
Summer Associate May 2023 – Present
- Write legal memoranda and conduct research on the National Labor Relations and Fair Labor Standards Acts.
- Assist attorneys conducting collective bargaining, fact finding in preparation for litigation, and advising clients.

HEALTH JUSTICE ALLIANCE **Washington, DC**
Student Attorney January 2023 – May 2023
- Represented two clients in cases related to housing discrimination and family law in a medical-legal partnership.
- Negotiated with opposing parties to achieve clients' goals and counselled clients about their legal claims.

U.S. DEPARTMENT OF LABOR **Washington, DC**
Legal Extern, Office of the Solicitor, Mine Safety and Health Division September 2022 – December 2022
- Drafted motions and sections of briefs to support Mine Act enforcement and promote worker safety.

FEDERAL COMMUNICATIONS COMMISSION **Washington, DC**
Legal Intern, Office of Commissioner Geoffrey Starks May 2022 – August 2022
- Analyzed proposed regulations, enforcement litigation, and prepared the commissioner for stakeholder meetings.

GEORGETOWN LAW WORKERS' RIGHTS INSTITUTE **Washington, DC**
Research Assistant January 2022 – Present
- Published *What A Runaway Chipotle Means for Worker's Rights* in the Georgetown Journal on Poverty Law and Policy.
- Presented research at 2022 Labor Research and Action Network conference at Morehouse College.

CENTER FOR LAW AND SOCIAL POLICY (CLASP) **Washington, DC**
Legislative Assistant June 2020 – July 2021
- Collaborated with Congressional staffers and the Biden transition team to advance CLASP's anti-poverty mission.

Child Care and Early Education Research Assistant August 2017 – June 2020
- Presented research at three policy conferences, wrote public comments, six reports, and several blog posts.

SELECTED HONORS AND COMMUNITY INVOLVEMENT

- 2023 Major League Baseball Players Association Michael Weiner Scholarship for Labor Studies
- 2022 Federal Communications Bar Association Award
- SNAP Outreach Specialist, DC Hunger Solutions (January-April 2018, 2019)

INTERESTS

- Reading memoirs, watching college basketball, fishing, hiking in national parks

Record of: Shiva M. Sethi
GUID: 809889550

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	93	Legal Process and Society Naomi Mezey	4.00	B+	13.32	
LAWJ	002	93	Bargain, Exchange, and Liability David Super	6.00	A-	22.02	
LAWJ	005	33	Legal Practice: Writing and Analysis EunHee Han	2.00	IP	0.00	
LAWJ	009	36	Legal Justice Seminar David Luban	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	45.33	3.49
Cumulative	13.00	13.00	45.33	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	93	Democracy and Coercion Louis Seidman	5.00	B+	16.65	
LAWJ	005	33	Legal Practice: Writing and Analysis EunHee Han	4.00	B	12.00	
LAWJ	007	93	Property in Time Daniel Ernst	4.00	B+	13.32	
LAWJ	008	31	Government Processes Howard Shelanski	4.00	A+	17.32	
LAWJ	611	13	Questioning Witnesses In and Out of Court Michael Williams	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	18.00	17.00	59.29	3.49
Annual	31.00	30.00	104.62	3.49
Cumulative	31.00	30.00	104.62	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1491	38	Externship I Seminar (J.D. Externship Program) Manpreet Teji	3.00	NG	0.00	
LAWJ	1491	86	~Seminar Manpreet Teji	1.00	A	4.00	
LAWJ	1491	87	~Fieldwork 2cr Manpreet Teji	2.00	P	0.00	
LAWJ	165	05	Evidence Michael Gottesman	4.00	A-	14.68	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	A-	14.68	
LAWJ	264	05	Labor Law: Union Organizing, Collective Bargaining, and Unfair Labor Practices Brishen Rogers	3.00	A	12.00	

In Progress:

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	14.00	12.00	45.36	3.78
Cumulative	45.00	42.00	149.98	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	263	05	Employment Law	3.00	A+	12.99	
LAWJ	627	4	Development of Lawyering Identity	4.00	A	16.00	
LAWJ	627	81	~Seminar	2.00	A	8.00	
LAWJ	627	82	~Case & Project Handling	4.00	A-	14.68	

In Progress:

LAWJ	627	05	Health Justice Alliance Law Clinic			In Progress	

Transcript Totals	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	51.67	3.97
Annual	27.00	25.00	97.03	3.88
Cumulative	58.00	55.00	201.65	3.67

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in strong support of Shiva Sethi's application for a clerkship in your chambers. Shiva was a student in my "Government Processes" course (essentially a survey of administrative law), a required course in the special "Section 3" curriculum Shiva pursued during his first year at Georgetown Law. That curriculum brings a broader theoretical and policy framework into the first-year curriculum than is traditionally present. Shiva excelled in that class – he received the sole A+ that I gave in the class, a grade that I often do not confer at all. Shiva was simply the best student I have had in Government Processes in the three years I have taught the course and one of the best students I have had in my years on the Georgetown faculty.

The Government Processes class is particularly challenging for first-year students who have not yet studied constitutional law. Shiva nonetheless mastered the material and, among a group of very smart students, distinguished himself with the depth of the questions he asked and the incisiveness of the questions he answered. Shiva's grasp of the complexities of constitutional separation of powers and the nuances of judicial review of agency action were truly impressive. Shiva consistently stood out for his ability to identify the key issues in the cases we studied and intelligently discuss the analytical and doctrinal complexities that these cases usually involved. His clear responses to hard questions I asked during class were of great benefit to his classmates. Shiva was able to synthesize the different strands of administrative law we studied into a coherent framework that made him a leader in our class discussions. I was very grateful to have him in class.

Shiva is a deeply thoughtful, mature, and committed future lawyer. We have had numerous discussions outside of class about the application of administrative law to labor and employment issues, about government regulation, and about the interaction among government agencies, private entities, and the courts. It is fair to say that in discussions with Shiva I feel more like I am talking to a peer or colleague than to a law student. Yet there is not the slightest arrogance or conceit in his manner.

The bottom line is that Shiva would be a terrific addition to the legal team in any environment, and particularly so as a law clerk in a collegial chambers with a demanding docket. I therefore strongly endorse Shiva's application. Any judge will be very fortunate to have him as a law clerk.

Please do not hesitate to contact me if additional discussion would be helpful.

Sincerely,

Howard Shelanski
Professor of Law
Joseph and Madeline Sheehy Chair in Antitrust Law and Trade Regulation
hshelanski@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Shiva Sethi in the strongest possible terms for a clerkship in your chambers. Shiva sought me out in his first year at Georgetown given his interest in labor and employment law, and since then we have been in regular contact. He also took my Labor Law class in the Fall of 2022. Based on our interactions both inside and outside of class, I feel I have gotten to know him quite well.

Shiva's work in my class was outstanding. He frequently volunteered to discuss cases, and invariably had insightful and original comments on the materials. On several occasions he pushed back on my own interpretation of cases or their reasoning in a way that was quite respectful and insightful. He earned an A, with an exam that was among the best in the class. Needless to say Shiva's writing and legal analysis were extremely strong on the exam. Given his excellent class participation and clear grasp of the materials, I was not at all surprised by the grade.

Through our meetings outside of class it has become clear to me that Shiva has a rare combination of first-rate analytical abilities and a deep commitment to social justice. Given his college achievements, which included a double major in economics and global studies and several prestigious scholarships, Shiva certainly could have pursued many different career options. But he chose to spend four years working on issues of economic and racial justice at the Center for Law and Social Policy. Likewise, this summer he surely could have found a job at a large prestigious corporate law firm, but instead he chose to intern at Bredhoff & Kaiser, one of the nations' leading union-side labor law boutiques.

Shiva has also been active in the Georgetown Law community. This school year he has done outstanding work with the Worker's Rights Institute, researching and publishing on labor law issues and organizing several events that were quite well-attended and informative. He did that while carrying a full course load including a clinic, serving as one of the Article's Editors for the *Georgetown Law Journal*, and staying involved in multiple student groups including the Black Law Students Association. His ability to manage that range of commitments speaks to both his work ethic and his organizational skills. Those various efforts, together with his academic achievements, likely helped him with the Michael Weiner Scholarship for Labor Studies, a prestigious scholarship that provides financial support for students planning careers in labor and employment law.

Finally, I can also say that Shiva is a student of uncommon maturity and poise, with strong interpersonal skills. He is able to connect with other students from a wide range of backgrounds, which suggests he has significant leadership abilities. I believe he has a very bright future ahead of him as a lawyer and advocate, and I will not hesitate to recommend him highly to legal employers in the future.

Please do not hesitate to reach out if I can be of any further assistance.

Sincerely,

Brishen Rogers
Professor of Law

Brishen Rogers - br553@georgetown.edu - 2023346078

May 16, 2023

The Honorable Judge Grey

United States District Court
Dear Judge Grey:

I submit this letter of recommendation on behalf of Shiva Sethi for a judicial clerkship.

I am a visiting professor here at Georgetown Law Center where I teach a course on labor law and the 21st century workforce. I am also the executive director of Georgetown's Workers' Rights Institute (WRI).
Shiva Seth is currently a rising third year student in pursuit of a Juris Doctorate here at Georgetown Law Center and is has, for the last two years, been one of the research assistants at the Workers' Rights Institute. WRI could not be more delighted. As his employer and mentor, I've had the opportunity to know Shiva's worth as well as the quality of his work. It is on these bases; I enthusiastically recommend him for a judicial clerkship. Prior to becoming faculty at Georgetown Law I had the honor of serving as Board Member and Chairman of the National Labor Relations Board during the Obama administration. In that capacity, I have reviewed and assessed the quality and skills of staff attorneys tasked to research and write the very important decisions of that agency. Mr. Sethi's grasp of the law, his analytical ability and his persuasive argument would have made him well suited for my staff.
I first met Shiva during his first weeks as a first year student. He sought me out because he was interested in the Workers' Rights Institute and wanted to know more about its mission and activities. Having worked for a public advocacy organization like the Center for Law and Social Policy (CLASP), Shiva presented well as one with a keen interest in social justice and worker rights. I took the chance of hiring him as a research assistant in the second semester of his first year, and my decision could not have been wiser. Shiva has proven himself to be a quick study, meticulous researcher, and talented writer. His contribution to the mission of WRI has been invaluable. For example, During his time at WRI, Shiva has co-written an article educating the public on Chipotle's Anti-Union Tactics which was published in the Georgetown Journal on Poverty Law and Policy. For that article Shiva not only researched and analyzed the jurisprudence, but also contributed astute observations regarding the inequities and inadequacies in the laws related to worker protections. Shiva also helped prepare me for my testimony before the House of Representatives Committee on Education and Labor in September of 2022. He has prepared materials on the racial and gender biased origins and consequences of devaluing domestic and childcare labor. In that regard, Shiva, representing WRI, presented at an international conference of the Labor Research and Action Network (LRAN). Working with me, Shiva has researched a variety of worker rights issues including gender equity as well as challenges to local and national organizing. He has turned research into events such as online and in person panel discussions on trending issues affecting today's labor relations landscape. Shiva is eager, analytical and is able to connect his knowledge of history and policy to his work product. He stays in tune with labor trends, and often is the one informing me of the latest development on labor matter outside his area of assignment. He turns over assignments quickly with the thoroughness one would expect from a seasoned legal researcher.
As a former employer of lawyers, I recognize qualities necessary of a good law student, particularly one who has shown Shiva's abilities. Shiva continues to perform well in the rigorous Georgetown academic environment, which includes among other responsibilities, his service as Executive Articles Editor of the Georgetown Law Journal. The rigor of this environment has yet to diminish Shiva's enthusiastic pursuit of knowledge and passion for justice. Rather, he is thriving. I believe that Shiva Sethi should be offered a judicial clerkship without hesitation, as there is no doubt that your court will greatly benefit from his talents. Feel free to contact me with any questions that you might have.

Sincerely,

Mark Gaston Pearce

mark.pearce@georgetown.edu

(cell)716-308-3494

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Writing Sample

The attached writing sample is an early draft of an article which was published in the online version of the Georgetown Journal on Poverty Law and Policy on March 20, 2023. While I published the final version of the Article with a coauthor, I wrote the vast majority of the Article by myself. I wrote the entirety of the attached version without assistance. The final, published version of the article is available here.

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What a Runaway Chipotle Means for Workers Rights

By Shiva Sethi and Mark Gaston Pearce

I. Closing a Chipotle in Augusta, Maine

Last July, Chipotle abruptly announced that it was closing a store in Augusta, Maine. The Augusta Chipotle was special – it was the first store in the chain to attempt to unionize. Chipotle's closure of the Augusta store fits into a pattern of how large businesses use partial closures to stifle organizing drives. This saga demonstrates the inadequacy of modern procedures and remedies.

Chipotle is a ubiquitous restaurant chain with nearly 3,000 locations and $7.55 billion in annual sales. It employs nearly 100,000 workers whose starting pay ranges between $11-18 dollars per hour.[1] Chipotle closed ten U.S. stores in the first half of 2021 and one store in the nine months before March 31, 2022.[2]

Before deciding to organize, the Augusta workers walked off the job. They protested unsafe working conditions including understaffing, excessive hours, orders to falsify work records, and more.[3] In response, the company closed the store for safety training. Later that month, most workers at the store signed union cards and they informed management of their intent to unionize, officially beginning the union election process.[4]

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[1] Macro Trends, *Chipotle Mexican Grill*, https://www.macrotrends.net/stocks/charts/CMG/chipotle-mexican-grill/number-of-employees (last visited January 1, 2023); Chipotle Mexican Grill, *Chipotle Increases Wages Resulting in $15 Per Hour Average Wage and Provides Path of Six Figure Compensation in ~3 Years* (May 10, 2021) https://newsroom.chipotle.com/2021-05-10-Chipotle-Increases-Wages-Resulting-In-15-Per-Hour-Average-Wage-And-Provides-Path-To-Six-Figure-Compensation-In-~3-Years.

[2] Sarah Todd, *Are Starbucks and Chipotle Union Busting by Closing Stores?*, QUARTZ, (July 27, 2022), https://qz.com/2191767/are-starbucks-and-chipotle-union-busting-by-closing-stores/.

[3] Keith Edwards, *Augusta Chipotle Restaurant Workers May be First in Nation to Unionize Following Health, Labor Concerns*, CENTRALMAINE.COM (June 22, 2022); https://www.centralmaine.com/2022/06/22/augusta-chipotle-workers-decide-to-unionize/ Keith Edwards, *Augusta Chipotle Workers Walkout, Claim Unsafe Conditions Due to Understaffing*, CENTRALMAINE.COM (June 17, 2022) https://www.centralmaine.com/2022/06/16/augusta-chipotle-workers-walk-out-claim-unsafe-conditions-due-to-understaffing/.

[4] *Id.*

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Chipotle closed the Augusta store hours before the store's workers were scheduled to have a National Labor Relations Board (NLRB) hearing about their election. Chipotle did not offer to transfer Augusta workers to other Chipotles, but it gave them severance and offered to help them find work elsewhere.[5] The company's explained that it was closing the store because of excessive staff absences.[6]

In August, the Augusta workers discovered that Chipotle was hiring workers for another location 45 minutes away in Auburn, Maine.[7] When the Augusta workers tried to apply to the Auburn store, they found that the company had locked them out from using the email addresses that the company had on file.[8] One of the leaders of the Augusta organizing drive, Brandi McNease, filled out an application using a different email address. The Auburn store scheduled an interview with her the next day.

Before McNease interviewed, the Auburn manager called her. She told McNease that the regional manager, Jarolin Maldonado, had told her not to interview McNease because she had attendance problems in the past.[9] McNease had never been disciplined for attendance issues. The store manager also said that she didn't know "you were part of that group."[10] McNease said that

[5] Andy O'Brien, *Chipotle Blacklists Maine Workers Who Tried to Unionize, Union Filed NLRB Complaint*, MAINE AFL-CIO, (Aug. 11, 2022), https://maineaflcio.org/news/chipotle-blacklists-maine-workers-who-tried-unionize-union-files-nlrb-complaint.
[6] Dee-Ann Durbin, *Chipotle closes store in Maine, thwarting union efforts*, ASSOCIATED PRESS, (July 19, 2022), https://apnews.com/article/maine-augusta-national-labor-relations-board-cfcb6a5da7be0cbac088bb2b9549436e.
[7] *O'Brien,* supra note 5; As of October 2022, this hiring advertisement was still posted online. Restaurant Team Member – Crew (3286 – Auburn Center Street) (2022) Retrieved from https://www.google.com/search?q=chipotle+Auburn,+ME+jobs&client=safari&rls=en&ei=9UTxYoKlA6qIptQP8_aKIA&uact=5&oq=chipotle+Auburn+jobs&gs_lcp=Cgdnd3Mtd2l6EAM6BwgAEEcQsAM6CggAEEcQsAMQyQM6BQgAEIAEOggIABCABBDJA0oECEEYAEoECEYYAFC8BljIIGC7ImgBcAF4AIABYIgB2geSAQIxMpgBAKABAcgBCMABAQ&sclient=gws-wiz&ibp=htl;jobs&sa=X&ved=2ahUKEwi2ksys4rf5AhWMD1kFHdo2An8Qkd0GegQIBBAB#fpstate=tldetail&link_id=7&can_id=7f8dc5647b05e8c908960e833bcbea2e&source=email-ironwood-workers-unionize-blacklisted-workers-more&email_referrer=email_1629062&email_subject=good-news-for-municipal-workers-restaurant-organizing-more&htivrt=jobs&htidocid=cFh0rTBqFXwAAAAAAAAAAA%3D%3D.
[8] *O'Brien,* supra note 5.
[9] *Id.*
[10] Meaghan Bellavance, *Chipotle reportedly blacklists Augusta employees who filed to unionize,* NEWS CENTER MAINE (November 3, 2022 11:24 PM) https://www.newscentermaine.com/article/money/business/chipotle-

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the same regional director had told her that she was eligible to be rehired when Chipotle closed the Augusta store. This suggests that contrary to Chipotle's stated reasons for closing the Augusta store, it was motivated by illegal anti-union animus, to remove and exclude pro-union employees.

II. Legal Context for Closures in Response to Organizing

U.S. labor law grants employers the absolute right to *completely* shut down explicitly because of union opposition. However, employers who operate multiple locations cannot partially close one location to discourage workers from unionizing in other locations. Courts frequently struggle to distinguish between lawful and unlawful motives in partial closure cases. The tension between employees' labor rights and employers' nebulous economic rights, echoes throughout labor law. When *Jones & Laughlin* affirmed the constitutionality of the NLRA, the Court held the Act was constitutional partly was because it imposed limited restrictions on employer power.[11] Since that case, courts have struggled to define where employee rights end and where employer rights begin.

The canonical partial closure case is *Darlington Manufacturing*.[12] Darlington was one of several textile mills owned by the Milliken family.[13] In March 1956, a union began organizing workers at the Darlington mill in South Carolina. [14] During the organizing drive, the employer

blacklists-augusta-maine-employees-who-filed-for-union-food-business/97-ed587a53-0828-425a-8922-7585a579b341.

[11] NLRB. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45─6 (1937).

[12] Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 265─275 (1965).

[13] *Id.* at 275.

[14] *Id.* at 265─66.

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threatened to close the mill if the union won.[15] In September, the union won and six days later, the company's board voted to liquidate the mill. Over 500 workers lost their jobs and the plant closed in November.[16] The NLRB concluded that the mill was closed because of the company's anti-union animus in violation of Section 8(a)(3) of the National Labor Relations Act.[17] The Supreme Court unanimously affirmed the Board.

The Court distinguished between closing a business entirely and shutting down part of a business for an anti-union purpose.[18] The Court wrote, "a partial closing is an unfair labor practice… [violating the NLRA] if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonable have foreseen that such closing would likely have that effect.".[19] The court instructed the NLRB to make findings about the purpose and effect of closing the mill on the employers' employees at other locations. On remand, the NLRB ruled for the union.[20]

Subsequent cases have clarified *Darlington*'s rule. Employers who partially close or divert work because of any reason *besides* anti-union animus such as technological change or economic reasons do not violate the law. The Eleventh Circuit held that a manufacturer that shut down one of its plants two weeks after a union won an election there did not violate the NLRA because the closure was for economic reasons including declining demand for the employer's product.[21] Two weeks after meat cutters in a Texas Walmart voted to unionize, Walmart announced it was

[15] *Id.* at 266.
[16] *Id.*
[17] This section is now 29 U.S.C.A. § 158(a)(3).
[18] *Id.* at 272.
[19] *Id.* at 275.
[20] Darlington Mfg. Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968).
[21] Weather Tamer, Inc. v. N.L.R.B., 676 F.2d 483, 493 (11th Cir. 1982)

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ending 'meat cutting operations' and transitioning to selling pre-packaged meat.[22] The D.C. Circuit held this partial closure was not illegal since was motivated by technological change.[23]

Employers are more likely to be found liable in *Darlington* cases when they do not have a pre-existing plan to partially close and the circumstances provide sufficient evidence of anti-union motive. In *Purolater Armored,* the employer explained its partial closure by blaming the store's lack of profitability. The Eleventh Circuit held the closure was illegal because it was announced a week after the union won its election, the employer had demonstrated anti-union animus during the campaign, and the store had long been unprofitable.[24] Similarly, in *in re Chariot,* the Board held an employer illegally partially closed because there was no pre-existing closure plan before the union activity, the employer's campaign threats demonstrated anti-union animus, and they treated organizing employees differently from other employees.[25] In 2009, Boeing relocated business from a unionized plant in Washington to a non-unionized plant in South Carolina, affecting approximately 1,000 jobs.[26] A Boeing executive blamed the transfer on "strikes happening every three to four years in Puget Sound [the unionized plant]".[27] The NLRB alleged that Boeing had illegally diverted the work due to anti-union animus, and sought to reverse the transfer.[28] Boeing and the union settled.[29] The line between legal and illegal

[22] Frank Swoboda, *Wal-Mart Ends Meat Cutting Jobs,* WASH. POST, (March 4, 2000), https://www.washingtonpost.com/archive/business/2000/03/04/wal-mart-ends-meat-cutting-jobs/acdb8f7c-d7c2-4e31-aad7-8f690ba3b35b/.

[23] United Food and Com. Workers, AFL-CIO v. N.L.R.B., 519 F.3d 490, 493─97 (D.C. Cir. 2008). The Court also held that Walmart had violated its duty to bargain.

[24] Purolator Armored, Inc. v. N.L.R.B., 764 F.2d 1423, 1427─1431 (11th Cir. 1985).

[25] *In re* Chariot Marine Fabricators & Indus. Corp., 335 NLRB 339, 352─54 (2001).

[26] Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES (April 20, 2011), https://www.nytimes.com/2011/04/21/business/21boeing.html.

[27] Joshua Freed, *Boeing Accused Of Retaliating Against Union After Strike*, INDUSTRIAL DISTRIBUTION, (April 21, 2011), https://www.inddist.com/home/news/13765748/boeing-accused-of-retaliating-against-union-after-strike.

[28] National Labor Relations Board, *Boeing Documents*, https://www.nlrb.gov/news-publications/publications/fact-sheets/fact-sheet-archives/boeing-complaint-fact-sheet/boeing (last visited Jan. 1 2023).

[29] Senator Graham threatened the NLRB with "very, very nasty" consequences if the NLRB filed the complaint. The NLRB filed it anyway. Kevin Bogardus, *Senator threatened labor board before Boeing complaint*, THE HILL, (Nov.

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motivations for a partial closure is blurry, partly because one of the major reasons employers oppose unions is because they often increase labor costs, a paradigmatic 'economic reason'.

Chipotle is not the only employer that has been recently accused of *Darlington*-like tactics. Workers allege that Trader Joe's closed a store in response to an organizing effort there in August 2022.[30] The same month, Starbucks closed two unionized stores. The union, Starbucks Workers United (SWU), accused management of closing the stores as retaliation for organizing, alleging that 42 percent of recently closed stores had union activity.[31] Starbucks blamed the closure of profitable stores on safety.[32] Starbucks' CEO, stated "there are going to be many more". [33] Ironically, the safety concerns that prompted some workers to organize are being used to justify store closures.

III. Next Steps for the Augusta Workers

The Augusta workers have a strong *Darlington* claim but they may not receive all the remedies they seek even if a court finds Chipotle broke the law. The workers filed an unfair labor

9 2011, 10:17 PM), https://thehill.com/business-a-lobbying/178240-senator-threatened-labor-board-before-boeing-complaint/; Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, (Dec. 9 2011), https://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html.

[30] Dave Jamieson, *Trader Joe's Workers Decided to Unionize. The Company Abruptly Closed Their Store.*, HUFFINGTON POST, (August 17 2022, 8:42 PM), https://www.huffpost.com/entry/trader-joes-wine-shop-closed-union_n_62fd72cce4b071ea958c5b35.

[31] Hilary Russ, *Starbucks union claims company closed two cafes in retaliation*, REUTERS, (August 23, 2022, 3:47 PM), https://www.reuters.com/business/retail-consumer/starbucks-workers-union-claims-retaliation-closing-two-cafes-2022-08-23/; Elijah de Castro, *Cornell's Starbucks workers strike after grease trap failure,* THE ITHACAN, (April 20, 2022), https://theithacan.org/news/cornells-starbucks-workers-strike-after-grease-trap-failure/; Joanna Fantozzi, *Starbucks permanently shuts down unionized store as labor tensions continue to grow,* NATION'S RESTAURANT NEWS (June 13 2022), https://www.nrn.com/quick-service/starbucks-permanently-shuts-down-unionized-store-labor-tensions-continue-grow.

[32] *Id.*

[33] Allison Nicole Smith, *Starbucks CEO Howard Schultz says more stores to close for security reasons*, THE SEATTLE TIMES (July 19, 2022, 3:28 PM), https://www.seattletimes.com/business/starbucks/starbucks-ceo-howard-schultz-says-more-stores-to-close-for-security-reasons/.

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practice charge with the NLRB and in November 2022, the NLRB issued a sweeping complaint seeking several remedies including reopening the Augusta store, reinstating employees with backpay, and forcing Chipotle to recognize and bargain with the union. [34] The Board may also seek injunctive relief which would temporarily reinstate the workers while their cases are pending.[35] The case will be heard by an Administrative Law Judge in Spring 2022 whose decision can be appealed to the NLRB. If the Board rules in favor of the employees, the Board must petition a Court of Appeals for enforcement.[36]

Chipotle's blatant behavior likely prompted the NLRB to seek the boldest available remedy – forcing Chipotle to reopen the Augusta store. This remedy is rare, but not unprecedented. Even when Courts find *Darlington* violations, it has sometimes resists forcing employers to reopen closed facilities if such a reopening might threaten the business' viability.[37] More common remedies include reinstatement, backpay and notice posting. If the workers are awarded backpay, their award will be decreased by their interim earnings between when they lost their jobs and when they received the award. Punitive damages are unavailable and undocumented immigrants cannot receive backpay at all.[38]

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[34] Order Consolidating Cases, Consolidated Complaint and Notice of Hearing at 3–4, Chipotle Mexican Grill and Chipotle United, 01-CA-299617, (Ordered Nov. 4 2022); *see also* Beverly Banks, *NLRB Attys Say Chipotle Closure Amid Organizing Was Illegal*, Law360 (Nov. 4 2022, 3:38 PM), https://www.law360.com/employment-authority/articles/1546598/nlrb-attys-say-chipotle-closure-amid-organizing-was-illegal.

[35] 29 U.S.C. § 160(j) (commonly referred to as 10(j) injunctions) provides for such relief.

[36] The parties can also decide to settle at any point during this process.

[37] Lear Siegler, Inc., 295 NLRB 857, 861 (1989) (holding that to order restoration of a closed operation, the Board must demonstrate that such an order would not be unduly burdensome or endanger "the respondent's continued viability"; *in re Chariot Marine Fabricators & Indus. Corp.*, 335 NLRB at 356─58 (2001) (rejecting a reopening order in favor of a make whole remedy because reopening would be unduly burdensome on the employer).

[38] Republic Steel Corp. v. NLRB, 311 U.S. 7, 11─12 (U.S. 1940); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 150─52 (2002).

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NLRB General Counsel Abruzzo has encouraged the Board to take a more progressive approach than it has in the past.[39] She said, "[the NLRB must] utilize every possible tool we have to ensure that those wronged by unlawful conduct obtain true justice. To do this, we need to examine all of the ways that workers have been hurt by unfair labor practices and seek remedies that will fully address them." This case is an opportunity to clarify an opaque area of law in a high-profile case.

Since NLRB orders must be enforced by a federal court, they can be denied by a federal judge with a restrictive view of the Board's authority. Previous efforts by the Board to strengthen the Act have been halted by federal courts.[40] Courts have generally been deferential to federal agencies, but this may be changing. [41] In *West Virginia v. EPA* the Supreme Court stated, "our precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority".[42] This suggests that courts will be increasingly skeptical of assertions of authority by agencies like the NLRB.

IV. Broader Considerations

[39] National Labor Relations Board, *NLRB General Counsel Jennifer Abruzzo Issues Memo on Seeking all Available Remedies to Fully Address Unlawful Conduct,* (Sept. 8 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-seeking-all-available.

[40] Natl. Ass'n of Mfrs. v. NLRB 717 F.3d 947, 949─953, 967─970 (D.C. Cir. 2013), overruled by Am. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d 18 (D.C. Cir. 2014) (overruled on other grounds).

[41] Chevron v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842─45 (1984).

[42] W. Virginia v. EPA, 142 S.Ct. 2587, 2608 (2022); *See* also Kisor v. Wilkie, 139 S. Ct. 2400, 2414–2420 (2019).

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The surge in organizing has been met with an anti-union backlash from employers.[43] Closing a store in response to an organizing drive is a potent tactic for chilling organizing drives in national chains. When employers use these tactics, the NLRB must fight vigorously to hold them accountable. Policymakers must take action to strengthen the NLRB, and to clarify its remedies and penalties to ensure compliance.

The nationwide unionization wave has spread to several chains that might consider adopting *Darlington* tactics. Companies like Trader Joe's, Apple, and Home Depot are so profitable that they can afford to close branches to stop an organizing drive in its tracks.[44] Of course, management does not have to oppose organizing. In recent months several prominent employers including Condé Nast, Microsoft, and the MLB voluntarily recognized unions.[45]

Policymakers must ensure the NLRB has the resources to enforce the law in a timely and effective manner. In *Darlington*, the NLRB directed the employer to pay backpay rather than reopening the plant. The matter was settled fifteen years after the Supreme Court case, when the company paid millions to the workers and their estates. Injunctive relief should be a default option in these cases since delay benefits the employer – bills do not wait for NLRB adjudications and employees must meet their basic needs while they wait for their rights to be enforced. Defunding the NLRB has exacerbated the agency's delays; until the 2022 omnibus, the

[43] National Labor Relations Board, *First Three Quarters' Union Election Petitions Up 58%, Exceeding all FY21 Petitions Filed* (July 15 2022), https://www.nlrb.gov/news-outreach/news-story/correction-first-three-quarters-union-election-petitions-up-58-exceeding; Order Consolidating Cases, Consolidated Complaint and Notice of Hearing at 17, Starbucks Corporation and Workers United, 03-CA-295470, (Ordered Nov. 1 2022).
[44] Michael Sainato, *Mass firings, wage cuts and open hostility: workers are still unionizing despite obstacles*, THE GUARDIAN (Sept. 13 2022, 5:00 PM), https://www.theguardian.com/us-news/2022/sep/13/unions-starbucks-trader-joes-chipotle-petco.
[45] Elahe Izadi, *Condé Nast workers win recognition of company-wide union*, WASH. POST (Sept. 9 2022, 5:23 PM), https://www.washingtonpost.com/media/2022/09/09/conde-nast-union/; Héctor Alejandro Arzate, *Video Game Testers From Rockville Form Microsoft's First Union*, DCIST (Jan. 4 2023), https://dcist.com/story/23/01/04/md-microsoft-union-video-game/; James Wagner, *M.L.B. Will Voluntarily Recognize Minor League Union*, N.Y. TIMES (Sept. 9 2022), https://www.nytimes.com/2022/09/09/sports/baseball/minor-league-union.html.

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NLRB's funding had been stagnant since 2014.[46] This reduced the Board's staffing levels by 39 percent in the last twenty years.[47]

Legislators should rework the *Darlington* test. The current test relies on the chilling effect of the partial closure upon the employees who were not directly affected by the closure. This approach contrasts with how other NLRA cases are decided.[48] Courts should focus their analysis on the employer's interference with the collective bargaining rights of the workers in the closed down plant itself. Further, legislators should clarify the standard for evaluating partial closure cases, specifically distinguishing between permissible and impermissible economic motivations.

Legislative change is needed, but workers are not waiting for it. In August 2022, workers at a Chipotle in Michigan voted to unionize, becoming the first unionized Chipotle.[49] The fight to organize Chipotle workers continues.

[46] Gay Semel, *Viewpoint: The NLRB is Underfunded and Understaffed –And That's a Big Threat to the Current Organizing Wave*, LABOR NOTES, (July 6 2022), https://labornotes.org/2022/07/viewpoint-nlrb-underfunded-and-understaffed; Daniel Wiessner, *U.S. budget bill includes first increase for labor board since 2014,* REUTERS, (Dec. 20 2022, 1:34 PM), https://www.reuters.com/legal/government/us-budget-bill-includes-first-increase-labor-board-since-2014-2022-12-20/.

[47] Letter from Senator Bob Casey to Chair Murray and Ranking Member Blunt, Senate HELP Committee, May 10, 2022, https://www.casey.senate.gov/download/letter-to-appropriations-labor-subcommittee-on-nlrb-funding.

[48] Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 565─67 (1978); Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 801─5 (1945).

[49] Lauren Kaori Gurley, *Michigan Chipotle outlet the chain's first to unionize,* WASH. POST (August 25 2022, 6:57 PM), https://www.washingtonpost.com/business/2022/08/25/chipotle-union-victory-fastfood-michigan/.